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THE
EMPLOYERS' LIABILITY
ACTS

AND

THE ASSUMPTION OF RISKS

IN

NEW YORK, MASSACHUSETTS, INDIANA, ALABAMA,
COLORADO, AND ENGLAND

BY

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OF THE MASSACHUSETTS BAR

ST. PAUL, MINN.
KEEFE-DAVIDSON COMPANY
1902

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PREFACE.

Master and servant questions impose upon both court and legislature the delicate duty of applying fundamental principles of conduct to new and rapidly changing social and industrial conditions. The material interests of the community are so nearly affected that any rule is certain to be tinged by the unconscious sympathies or point of view of the tribunal. But there are duties on each side to be fairly measured, and one class cannot justly demand protection at the expense of the other.

The common-law rule has become unfair to the servant. Many statutes have sought to limit the fellow-servant exemption, and of them the Employers' Liability Act is perhaps the most satisfactory. Although founded on no broad theory of responsibility, it has worked substantial justice between the parties. Its interpretation by the English courts was favorable, and during the fifteen years it has been known in the United States the numerous manufacturing cases in Massachusetts and railroad cases of Alabama have definitely settled the construction to be placed upon its terms.

The more recent doctrine of the assumption of risk has not as yet received much attention from the legislature. The court has gone far in passing upon questions of fact arising under this defense, and, especially when the issue is whether the servant by remaining at

work in the face of a danger created by his master's default has condoned the wrong and undertaken the risk, seems to have trespassed upon the province of the jury. The workman now feels, perhaps justly, that this tendency of the court is unfair to him, and it is to this point that the legislation of the future will doubtless be directed.

The attempt has been made in this book to state briefly the common-law principles which govern the relation of master and servant with reference to injuries received in the course of the work, and to show the effect of the Employers' Liability Act upon them. Accordingly, the cases arising under the act in the five jurisdictions where it is in force, and in the federal courts, have been collected. Considerable space also has been devoted to an analysis of the defense of assumption of risk, and to the gathering of cases, both at common law and under the act, in the several jurisdictions mentioned. Reference has also been made to cases arising elsewhere. So far as is practicable, the subject-matter of the decisions has been indicated, and in the chapters on assumption of risk a note has been made when the decision was rendered by the court.

The volumes covered are to 182 U. S., 110 Fed., 178 Mass., pt. 1, 125 Ala., 155 Ind., 25 Ind. App., 27 Colo., and 14 Colo. App., inclusive, together with cases later reported in 61 N. E., 30 South, and 66 Pac. An index going somewhat into detail will, it is hoped, make them of advantage to persons interested in the subject.

FRANK F. DRESSER.

Worcester, Mass., March 6, 1902.

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EMPLOYERS' LIABILITY.

CHAPTER I.

THE EMPLOYERS' LIABILITY ACTS.

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§ 1. The common law.

The common law implies a contract between a master and a servant whereby the former undertakes, through himself or his agents, to use reasonable care to furnish and maintain suitable and safe places, machinery, and appliances for the work to be done, to hire competent servants, and to waive the servant of all dangers of the work known to him and not known to the servant, and the latter undertakes to assume the risk of in-

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jury arising from the dangers of the work which he knows, or ought to know, and the risk of injury caused by the negligence of all other servants in the common employment.

The liability of a master to answer in damages to a servant injured in the course of his employment first came up for decision in England in 1837.¹ The mutual rights and duties of the parties are yet to be placed upon an entirely satisfactory basis, and the rules which have been laid down either by the common law or by statute are tentative, and dictated by the public sentiment of the time rather than by any sound principle.

The common law had defined the duty which an individual owes a stranger, whether the act causing the injury was done by him personally or by the hand of his agent. It had declared the obligation of an occupier of premises towards those whom he invites upon them, and in all cases had laid down the rule that if an injury is received through a risk which was wittingly and voluntarily assumed, or is caused by a plaintiff's contributory negligence, he cannot be heard to complain. It was then sought to adapt these principles to a new class of cases where not a stranger or an invited person was injured, but a servant,—one standing in some sense in privity with the person to be charged. There was no difficulty in holding that the master personally must be free from fault, or that he must not invite his servant into a trap, but whether he was to answer to the injured servant as to a stranger for the acts of his other

¹ *Priestley v. Fowler* (1837) 3 Mees. & W. 1; *Murray v. S. C. R. Co.*, 1 McMul. (S. C.) 385; *Farwell v. Boston & W. R. Corp.*, 4 Mete. (Mass.) 49. See *Sword v. Cameron* (1839) 1 D. Sess. Cas. (Scotch) 493.

servants presented a very serious question. So to hold would in effect make him an insurer, and put an end to the successful conduct of the industries and railroads which, at the time the question was first presented, were becoming important factors in the community.

The rule that a principal is responsible to a stranger for the negligent act of his agent, whether the act was expressly authorized or impliedly authorized because within the scope of the agent's employment, had been recognized from the earliest time. This responsibility went so far that the principal might be held liable although the act was one which he had expressly forbidden. Many reasons have been given for this identification of principal and agent,—that the former, having put it in the agent's power to do the act, or deriving profit from the act, or failing to choose a competent agent, should bear the consequences, or that, as a loss has been sustained which ordinarily the agent cannot compensate, it is fair that the principal should pay. No one of these is a sufficient explanation, and perhaps the true ground is given by Chief Justice Shaw in *Farwell v. Boston & Worcester R. Corp.*:² "This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it."

In the opinion of Chief Justice Shaw in the decision which established the common-law rule in this class of cases, it is said that this rule of agency does not apply

² 4 Metc. (Mass.) 49, 55.

in actions by a servant against his master for an injury sustained in the conduct of the work: "The claim could not be placed on the principle indicated by the maxim *respondeat superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent, or unskillful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant."

It was then said: "The general rule, resulting from considerations as well of justice as of policy, is that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others.

* * * Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neg-

lect of duty, and leave the service if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer. * * * It was strongly pressed * * * that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. * * * The implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant, does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but

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upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant. * * * We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant.”³

The rules foreshadowed in that opinion have been developed with some variation of detail in the different jurisdictions,⁴ and the mutual rights and duties arising from the relation of master and servant are expressed in the terms of an implied contract. The master upon his side agrees to furnish reasonably safe and suitable places to work, with a sufficiency of materials and appliances and reasonably safe machinery to do the work required; to keep and maintain his works, machinery, and plant in the same safe condition; to provide competent workmen; so far as the servant may be assumed not to know the perils of the work itself or of the particular portion of it in which he is engaged, to instruct him and to warn him of any secret danger of which the master is aware. As to these matters the master is under a continuing duty, and is bound to exercise that measure of care which reasonably prudent men take in similar circumstances. These duties are personal to him, and he cannot, by delegating them to an agent, escape liability. The servant, on the other hand, agrees to assume the risk of injury from the negligence of the other servants engaged in the

³ *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49, 56, 57; *Ohio & M. R. Co. v. Hammersley*, 28 Ind. 371.

⁴ *Infra*, §§ 37, 55, 89, 90, 99. See, also, §§ 82, 88, 102, 107, 114.

common employment, without regard to their grade or rank or authority in the service, provided that the act causing the injury is not in the performance of any personal duty of the master intrusted to the negligent servant; and he agrees, further, to assume the risk of any injury arising from the dangers of the business itself, the method in which it is conducted, or from the condition of the works, machinery, or plant at the time he enters the employment, so far as he actually knows them, or, by the exercise of care commensurate with his age, condition, and experience, might know and appreciate them. To these special undertakings arising out of the relationship are added the general rules of conduct that if the injury is caused by the personal negligence of the master the servant may recover, and if it is caused by his contributory negligence or his voluntary assumption of the danger he may not recover.

This is frankly a rule of policy laid down by the courts. The servant is treated as a person invited to the premises, but the benefit of the maxim *respondeat superior* is denied him. The argument is that the conduct of business is essential to the community, and that it cannot be conducted successfully if the master is bound to indemnify a servant injured by the negligence of an agent whose act the master cannot control; that the servant is free to choose whether or not he will enter the relationship, and if he chooses to do so he can more easily protect himself against this danger than the master can protect him; and that the risk is compensated by the pay which the servant receives. Therefore, it is deemed fair that as a condition of the establishment of the relationship the servant should waive the right, which as a stranger he

had, to hold the master responsible for the acts of his other servants in the course of their employment. Whether this rule be placed upon the ground of a *status* established between the parties or on the ground of an implied contract is but a difference in phrase, and does not make it less a rule of policy. But the reasons which led to its adoption in 1840,—that business could not be successfully conducted if the doctrine of *respondeat superior* applied, that the compensation was governed by the risk, and that a servant could observe the conduct of others and complain of it,—if founded on fact then, have become theories to-day.

The marvelous increase of the class of industrial servants, and the constantly growing percentage of accidents for which there may be no recovery,⁵ have led to a widespread disbelief in the policy which dictated the common-law rule. The injustice which it was commonly felt the rule imposed was lessened somewhat by the limited construction several courts placed upon “common employment,” and the introduction of the “different department” and “superior servant” theories.⁶ In many states

⁵ The Twelfth Annual Report of the Statistics of Railroads of the Interstate Commerce Commission shows that, during the year 1899, 2,210 railroad employes were killed, and 34,923 injured, or one killed for every 420 employed, and one injured for every 27. From 1879 to 1881, 438 persons were killed, and 1,644 were injured, on railways in the United States, about half of whom were employes; and in the United Kingdom, after a careful investigation in 1872, it was estimated that, of the 200,000 railway employes, 1,080 were killed, and 27,340 injured. Actuaries were employed in 1882 by the London & Northwestern Railroad to estimate the ratio of the number of persons injured through their own carelessness to the whole number injured, and they reported that it was about 98 per cent.

⁶ *Infra*, § 55.

the rigor of the rule was lessened in the case of railroads by legislative action.⁷ The question was the subject of much agitation in England by labor organizations, and a committee of parliament was finally appointed to investigate the subject. The result of their exhaustive report was the passage, in 1880, of the employers' liability act, which has served as the model for similar statutes in the United States. In Massachusetts, after a long discussion, the English act was substantially adopted in 1887, and it was enacted in Alabama in 1885. Indiana and Colorado followed in 1893, and New York in 1902.⁸

"The employers' liability act was passed to obviate the injustice to workmen that employers should escape liability where persons having superintendence and control in the employment were guilty of negligence causing injury to the workmen. * * * The object of the act was to get rid of the inference arising from the fact of common employment with respect to injuries caused by any persons" who are intrusted with the duty of seeing that the ways, works, or machinery are in proper condition, who have duties of superintendence and control, and, in the case of railroads, who have charge or control of engines, switches, signals or trains.⁹

The act did not establish any new basis of liability. It took the common law as it found it, and said that,

⁷ *Infra*, § 73.

⁸ 43 & 44 Vict. c. 42; Civ. Code Ala. 1896, c. 43, § 1749 (2590),—first act passed 1885; Acts Mass. 1887, c. 270 (Rev. Laws, c. 106, § 71); Sess. Laws Colo. 1893, c. 77 (see Sess. Laws Colo. 1901, c. 67); Burns' Rev. St. Ind. 1901, §§ 7083-7087,—act passed 1893. For text of above acts, see Appendix.

⁹ *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357, 362; Parliamentary Papers 1877, vol. 10.

when an injury happened because of the negligence of certain fellow servants, it was more fair and just that the employer rather than the workman should bear the loss. It does not say that it is one of the master's personal duties to give proper orders, etc., though that is its effect. It rests on grounds of public policy, but a policy dictated by the legislature rather than the courts.

In 1897 a new act was passed in England, known as the "Workmen's Compensation Act." This also is dictated by public policy, but is based upon an entirely new theory. It disregards the common-law principles, and says that whenever a servant is injured in the course of his employment, whether the master is negligent or not, he shall receive compensation, unless the injury is caused by his own willful misconduct. It applies only to certain employments, and when the injury results in partial or total incapacity for two weeks. There is an elaborate scheme of compensation provided, but the workman has his election whether to accept the compensation under this act, or to rely upon his other remedies at common law or under the employers' act.¹⁰ The act is socialistic in its tendencies, and is merely a temporary scheme.

It must be borne in mind that, in the sixty years that have passed since the question was first presented to the courts for decision, industrial conditions have entirely changed, and that the rule laid down at common law has not been modified to meet the different conditions which a servant now encounters in his work.

The question is whether a distinction should be made

¹⁰ 60 & 61 Vict. c. 37.

between a servant and an invited person. Both are on the master's premises rightfully and on business advantageous to both parties, but one is a part of the master's business and the other is not. The common-law rule is fair in so far as it provides that the master must use care not to injure either one by imperfections or defects in his plant, and that each takes the risk of those dangers that he knows, and must use care to protect himself. Either a servant or an invited person may hold the master liable for the negligence of one of his servants who is an agent of the master in performing his personal duties. But here the common law drew the line, and said that though every servant was his master's agent so far as invited persons were concerned, and could fix the master with liability, such was not the case where another servant was injured, because, though the agency principle might be there, the injured servant had contracted not to hold the master liable for the negligent servant's acts. The servant may thus invoke the agency doctrine in some cases, such as a failure in the performance of personal duties, but has waived it in others. How far, then, ought this waiver to be implied? It ought to go no further than the reasonable understanding of the parties and the dangers to be encountered require.

A servant is hired to perform certain specified duties and accomplish a certain end. Within the scope of this employment he is a part of the business and identified with it. He works in a place about which he knows, with machinery with which he is familiar, and with other servants whose conduct he may to a greater or less extent observe. As to all these elements of danger he has equal knowledge with the master, and can pro-

tect himself more easily than the master can protect him.

When the servant steps outside the scope of his employment it is difficult to see how, in fact, he is in a different position from a stranger. The conditions and considerations which applied when he was performing the work which he was hired to do no longer in fact obtain. When, going outside his scope of employment, he is injured, he cannot hold the master liable, because he was not in a position or place where he had a right to be, and the master owed him no duty under such circumstances. Conversely, when, being within his scope of employment, he is injured by an agency which is without it, he should recover, because as to any agencies other than those within his scope of employment he is a stranger, and as such is entitled to some measure of protection.

The common law says that the scope of the employment is the end which the master accomplishes, and the servant contracts to take the risk of injury from the negligence of all servants engaged in forwarding that end. But is not it more in accord with the fact to say that the scope of the employment is the end which the servant accomplishes, and he takes the risk of the negligence of all those who work with him to that end? The rule laid down in the *Farwell Case*, at the time of the decision, did not need to distinguish between the two cases, since in the majority of businesses the men employed were few, and there was less detail and division into departments of work,—the objects of the master and of the servant were more nearly the same. There was no complaint of the injustice or the unrea-

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sonableness of the rule until the progress of business had made it in fact unreasonable, and a servant entering the employment was forced to assume not only the risk of the negligence of those engaged with him in forwarding the particular object for which he was hired, but also of all other servants, unconnected with his own scope of employment, who were forwarding the master's object by different means.

The difficulty is, of course, in determining just what is the object a servant is hired to perform, and who work with him as fellow servants in attaining that object. Perhaps it is only possible to divide a business for this purpose, as it is in fact divided, into different departments. It would seem that the jurisdictions which have adopted the "different department theory" have come nearer the true rule,¹¹ and that the employers' liability act and the workmen's compensation act are not only illogical, but grant in most cases more than the servant has a right to expect. However dangerous the business may be, whether from the works or machinery used or the men engaged in it, the servant voluntarily puts himself within the risk. It is fair that he should protect himself against dangers which he can control or avoid, and that the master should protect him against those which are within his own control and direction. The servant can protect himself only from dangers arising from his own use of

¹¹ *Infra*, § 55. On the subject generally, see Mass. House Documents 1885, No. 326; Fourteenth Ann. Rep. Mass. Bureau Statistics of Labor, 1883; Parliamentary Papers 1877, vol. 10; Hobbs, 2 Harv. Law Rev. 212; Pollock, Jurisprudence, 114; Hay, *Railway Accidents*; Shearman & R. Negligence (5th Ed.) §§ 177-180.

proper machinery or appliances, and from the negligence of servants employed with him whom he knows, and of whose competency he can judge; it makes no difference what their rank or grade in the service may be. But the furnishing of proper places and machinery or the hiring of competent servants or the conduct of the business generally are matters out of the servant's, and within the master's, control, and whether these be done by the master personally, or by his delegates, the servant cannot protect himself against negligence in performing them. It may be true that the master cannot control the acts of ordinary workmen in departments unconnected with the plaintiff's scope of employment, but neither can the plaintiff. The master is liable to all persons, other than his servants, for acts of his employes which he cannot control, nor they guard against, and it is fair to both parties that, where one servant is in such a position that he can neither guard against nor control the act of another servant, he should possess the same rights against the master as he had before he became a servant. It would seem that the rule of a master's liability to his servant should be, let the master answer for all things which the servant cannot answer for himself.

§ 2. Effect of the act.

The effect of the employers' liability act is to take from the master, in a case brought within its provisions, the special defense which he had at the common law,—that the injury was caused by the negligence of a fellow servant, the risk of which the plaintiff assumed upon his entrance into the employment.

The act does not create a new cause of action or take away existing remedies.

At common law the master could defend against an action by his servant by proving his own freedom from negligence, the plaintiff's contributory negligence, that the injury was caused by the negligence of a fellow servant, or that it happened through one of the other risks which the plaintiff had assumed. Any one of these defenses was a sufficient answer to the plaintiff's claim.¹² The first two are defenses which he might urge against the claim of a stranger, but the last two are peculiar to the relationship of master and servant, and are said to rise from the implied contract of service between them.

The employers' liability act sought to limit the scope of these last two defenses to servants who were not intrusted with the care of the ways, works, and machinery of the employer, and who were not placed by him in positions of control and authority. As to his liability for the acts of such of his servants as were intrusted with these duties, together with certain railroad employes, the act gave the injured servant the same rights as a stranger invited to the master's premises.

By the terms of the English act, "where * * * personal injury is caused to a workman by reason [of negligence in five specified cases] the workman * * * shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."¹³ This language "has not been

¹² *Weblin v. Ballard*, 17 Q. B. Div. 122, 124.

¹³ 43 & 44 Vict. c. 42, § 1; Code Ala. 1896, § 1749 (2590): "The
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felicitously chosen. Taking the language in its apparently literal sense, the plaintiff must be regarded as a stranger. If he is to be taken as not being a workman of, nor in the service of, the employer, nor engaged in his work, it follows that he is on the premises as a trespasser or bare licensee. He is not there under contract, nor in performance of any work in which the employer and he are mutually interested, so that in the majority of cases no action could be maintained."¹⁴ "The true view, in my opinion, is that the act, with certain exceptions, has placed the workman in a position as advantageous as, but no better than, that of the rest of the world who use the master's premises at his invitation on business. If it has created any further or other duty to be fulfilled by the master, I do not know what it is, how it is to be defined, or who is to define it."¹⁵

This construction "means that the workman, when employer is liable to answer in damages to such servant or employe as if he were a stranger, and not engaged in such service or employment, in the cases following."

Rev. Laws Mass. c. 106, § 71: "The employe, or his legal representatives, shall, subject to the provisions of the eight following sections, have the same rights to compensation and of action against the employer as if he had not been an employe, nor in the service, nor engaged in the work, of the employer." See Acts 1887, c. 270, § 1.

Sess. Laws. Colo. 1893, c. 77 (Mills' Ann. St. 1891-96, § 1511a), has a like provision. Burns' Rev. St. Ind. 1901, § 7083, omits this provision.

¹⁴ Griffiths v. Earl of Dudley, 9 Q. B. Div. 357, 366.

¹⁵ Thomas v. Quartermaine, 18 Q. B. Div. 685, 693; Griffiths v. Earl of Dudley, 9 Q. B. Div. 357; Morrison v. Scottish E. L. & A. Assur. Co., 16 Rettie, Ct. Sess. Cas. (4th Ser.) 212; Mobile & B. Ry. Co. v. Holborn, 84 Ala. 133, 136; Griffin v. Overman Wheel Co. (C. C. A.) 61 Fed. 568.

he sues his master under the provisions of the act for any of the five matters designated, shall be in the position of one of the public suing, and shall not be in the position a servant theretofore was when he sued his master; in other words, that the master shall have all the defenses he theretofore had against any one of the public suing him, but shall not have the special defenses he theretofore had when sued by his servant.”¹⁶

Thus, the defenses which the master might have relied upon to defeat a stranger's claim—that he was not guilty of negligence, or that the plaintiff was guilty of negligence contributing to the accident—are not affected by the act.¹⁷ But the special defense arising from the relationship is removed in the cases specified in the act.¹⁸

The other special defense peculiar to the relationship of master and servant is that known as the “assumption of risk.” The servant is said to contract to take the

¹⁶ *Weblin v. Ballard*, 17 Q. B. Div. 122; *Mobile & B. Ry. Co. v. Holborn*, 84 Ala. 133, 136.

¹⁷ *Stuart v. Evans*, 31 Wkly. Rep. 706, 49 Law T. (N. S.) 138; *Highland A. & B. R. Co. v. Walters*, 91 Ala. 435, 442; cases above cited. And see *infra*, § 117.

¹⁸ *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357; *Weblin v. Ballard*, 17 Q. B. Div. 122; *Thomas v. Quartermaine*, 18 Q. B. Div. 685; *Yarmouth v. France*, 19 Q. B. Div. 647; *McAvoy v. Young's P. L. & M. O. Co.*, 9 Rettle, Ct. Sess. Cas. (4th Ser.) 100; *Morrison v. Baird*, 10 Rettle, Ct. Sess. Cas. (4th Ser.) 271, 277; *Robertson v. Russell*, 12 Rettle, Ct. Sess. Cas. (4th Ser.) 634; *Stewart v. Louisville & N. R. Co.*, 83 Ala. 493; *Mobile & B. Ry. Co. v. Holborn*, 84 Ala. 133, 135; *Columbus & W. Ry. Co. v. Bradford*, 86 Ala. 574; *Woodward Iron Co. v. Andrews*, 114 Ala. 243; *Colorado M. & E. Co. v. Mitchell*, 26 Colo. 284; *Ashley v. Hart*, 147 Mass. 573; *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 195; *Coffee v. New York, N. H. & H. R. Co.*, 155 Mass. 21, 22. See *infra*, § 117.

risk of injury from the dangers of the business and the condition of things which he finds upon his entrance into the employment, so far as he actually knows or by reasonable care ought to know of them. A similar rule is applied to dangers subsequently arising during the employment. The doctrine rests upon the maxim, [*Volenti non fit injuria*], and has been carried to a great extent. It is not intended in this place¹⁹ to discuss the subject. It has given rise to much difference of opinion, both in cases arising at common law and under the act. It is said that the act, by placing a servant in the same position as a person invited to the master's premises, has done away with the defense;²⁰ that it has entirely removed the defense, and substituted for it the statutory one,—section 2, subd. 3, of the English act;²¹ that although the risks of the business were assumed, yet, for a peril arising after the employment was accepted, the defense found in the statute itself was the only one available.²² The question is still open in England,²³ but in Massachusetts, Alabama, and Indiana²⁴ it is now held that the defense of assumption

¹⁹ *Infra*, cc. 8, 9, "Assumption of Risk."

²⁰ *Esher, M. R.*, in *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 688.

²¹ *Weblin v. Ballard*, 17 Q. B. Div. 122.

²² *Mobile & B. Ry. Co. v. Holborn*, 84 Ala. 133, 135; *Highland A. & B. R. Co. v. Walters*, 91 Ala. 435, 441.

²³ *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357; *Weblin v. Ballard*, 17 Q. B. Div. 122; *Thomas v. Quartermaine*, 18 Q. B. Div. 685; *Yarmouth v. France*, 19 Q. B. Div. 647; *Stuart v. Evans*, 31 Wkly. Rep. 706, 49 Law T. (N. S.) 138; *Smith v. Baker* [1891] App. Cas. 325. See *infra*, § 117.

²⁴ *O'Maley v. South Boston G. L. Co.*, 158 Mass. 135; *Birmingham R. & E. Co. v. Allen*, 99 Ala. 359; *Whitcomb v. Standard Oil Co.*, 153 Ind. 513. See *infra*, § 117.

of risk applies as fully under the act as it did at common law, and the only effect of the act is to except the negligence of the classes of servants mentioned in it from the risks which an employe was previously held to have assumed.

The effect of the act is to remove a defense, not to create a new cause of action. "The ground upon which the action is brought—the ground of liability—is a common-law liability; and the only effect of the statute is, in the case of fellow workmen, to take away a plea which might exclude such an action based upon the common law in the event of the wrong complained of having been done by a fellow workman. The statute, under certain provisions and with certain safeguards, provides that that shall not be a plea to exclude liability for the future, provided the action be within certain limits and on certain conditions. Now, I do not look upon that as raising a new ground of action; on the contrary, the ground of action, *qui facit per alium, facit per se*, remains, for that is the foundation of the liability which exists between master and servant."²⁵

The several acts have some provisions peculiar to them which are noted in the subsequent sections. The Colorado act provides for a joinder of the negligent servant in an action under it, and the recovery of damages against him if his negligence was the proximate cause of the injury.²⁶

²⁵ Morrison v. Baird, 10 Rettle, Ct. Sess. Cas. (4th Ser.) 271, 277; Thomas v. Quartermaine, 18 Q. B. Div. 685, 692. But see Lovell v. De Bardelaben C. & I. Co., 90 Ala. 13, 17.

²⁶ Sess. Laws 1893, c. 77, § 5; Mills' Ann. St. 1891-96, § 1511e. "If the injury sustained by the employe is clearly the result of the neg-

Common-law remedies are not taken away.

It is apparent that the act has not attempted to define generally the rights and duties of master and servants, and is not a codification of the law. "The work-

ligence, carelessness, or misconduct of a coemployee, the coemployee shall be equally liable, under the provisions of this act, with the employer, and may be made a party defendant in all actions brought to recover damages for such injury. Upon the trial of such action, the court may submit to and require the jury to find a special verdict upon the question as to whether the employer or his vice principal was or was not guilty of negligence proximately causing the injury complained of, or whether such injury resulted solely from the negligence of the coemployee, and in case the jury by their special verdict find that the injury was solely the result of the negligence of the employer or vice principal, then and in that case the jury shall assess the full amount of plaintiff's damages against the employer, and the suit shall be dismissed as against the employee; but in case the jury by their special verdict find that the injury resulted solely from the negligence of the coemployee, the jury may assess damages both against the employer and employee."

The section only provides that "the coemployee shall be equally liable under the provisions of this act with the employer," and thus, unless the master can be held liable under the act, this section does not apply. To make out a case against the master it must appear that "personal injury is caused to an employe * * * by reason of" the negligence of the employer, or of some coservant mentioned in one of the three clauses; there must be negligence, and that negligence must proximately cause the injury. Thus it would seem that the "coservant" mentioned in this section must be one filling the description contained in one of the three clauses, and not any fellow servant whatever, since to hold that this word meant any fellow servant would have the effect not only of doing away with the words "by reason of" in the first section of the act, but also, by breaking the causal connection, changing the well-settled rule that only the proximate, and not the remote, cause is to be looked to in fixing liability. The words "vice principal," unless controlled by the context, mean such persons as are considered vice principals at common law; that is, they who execute the personal duties of the master, or are placed by him in charge of an entire depart-

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man is obliged to rely on the contract of service. But for that he would have no right of action at all; he is only entitled to be upon the employer's premises by virtue of it."²⁷ Constant reference must be made to the common law to define who are masters and who servants, what is the scope of the employment, and whether the injury was the proximate result of the negligence; and negligence itself is determined by the common law, and not by the act. The act, moreover, is silent concerning certain terms of the contract of service. It does not impose any obligation on the master to employ competent servants, nor to instruct or warn his servants about their work or the dangers of it. These obligations were too well settled and important to be taken away by implication merely, and the

ment of the work. Most of the servants mentioned in these three clauses, and especially in the last one, do not fulfill that definition.

The section means, then, that where the master, or some one who is, at common law, his vice principal, is personally negligent, thereby causing the accident, the jury shall assess the full amount of the plaintiff's damages against the employer. But if the master is not personally negligent, but is made liable solely through the effect of the act, and the actual negligence causing the injury is that of the coemploye, who comes within the definition of a person intrusted with the care of the ways, etc., or with duties of superintendence, or having charge and control of a switch, etc., then damages shall be assessed against both master and servant,—against the former because the injury has happened "by reason of" the negligence of one for whom, under the act, he is responsible, and against the latter because his lack of care has caused harm to another. To construe the section otherwise would radically change the common law, and such a construction is not to be adopted unless the terms of the statute compel it.

²⁷ *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357, 364; *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 137.

courts have held that the act was remedial, and a concurrent, instead of an exclusive, remedy.

"It would not need the aid of previous exposition to show that the main purpose of the statute, as the title intimates, is to extend the liability of employers in favor of employes, and that it does not attempt to codify the whole law upon the subject, and that it leaves open some common-law defenses and some common-law liabilities. * * * In those cases within the words of St. 1887, c. 270, § 1, cl. 1, in which the common law gives an employe a remedy, he still has a right to sue under the same conditions, and to recover damages to the same extent, as if the statute had not been passed."²⁸

"It relates to a class of cases in which before no cause of action existed,—to a class of injuries the damages for which, at common law and under our statutes, had been bartered away before they accrued. The statute was one of enlargement purely. No existing right was curtailed, limited, or taken away. The only limitations in the act were upon causes of action created by the act, and having no existence outside of it."²⁹

"The right of an employe to maintain an action under this statute is not identical with his right to main-

²⁸ *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 193, 196; *Coughlin v. Boston Tow-Boat Co.*, 151 Mass. 92; *Clark v. Merchants' & M. T. Co.*, 151 Mass. 352; *Dacey v. Old Colony R. Co.*, 153 Mass. 112, 118; *Clark v. New York, P. & B. R. Co.*, 160 Mass. 39; *Clare v. New York & N. E. R. Co.*, 172 Mass. 211; *Mobile & B. Ry. Co. v. Holborn*, 84 Ala. 133; *Culver v. Alabama Midland Ry. Co.*, 108 Ala. 330; *Laughran v. Brewer*, 113 Ala. 509; *Colorado M. & E. Co. v. Mitchell*, 26 Colo. 284; *Morrison v. Baird*, 10 Rettle, Ct. Sess. Cas. (4th Ser.) 271; *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357; *Gibbs v. Great Western Ry. Co.*, 12 Q. B. Div. 208; *Weblin v. Ballard*, 17 Q. B. Div. 122.

²⁹ *Lovell v. De Bardelaben C. & I. Co.*, 90 Ala. 13, 17.

tain an action at common law. It may be greater or it may be less. * * * The plaintiff seeking to avail himself of the benefit of this act must bring himself within its provisions, and show that his case falls within the cases specified therein."³⁰

As the act limits the damages which may be recovered and also contains provisions as to the giving of notice and the time when the action must be begun, a plaintiff would prefer to bring his action at common law, where the facts would permit a recovery. If the evidence is doubtful, counts at common law and under the act may be joined in the declaration, and at the trial he may elect upon which to proceed. As the cause of action is the negligence of the defendant, a recovery either at common law or under the act bars a subsequent action under the other remedy for the same cause.³¹ The act does not affect any right of action which the injured servant may have against the negligent servant,³² or any right of action by the master against the latter.³³

³⁰ *Coffee v. New York, N. H. & H. R. Co.*, 155 Mass. 21, 22; *Lynch v. Allyn*, 160 Mass. 248, 252; and cases above cited.

³¹ *Ryalls v. Mechanics' Mills*, 150 Mass. 190; *Beauregard v. Webb G. & C. Co.*, 160 Mass. 201; *Clare v. New York & N. E. R. Co.*, 172 Mass. 211; *Highland A. & B. R. Co. v. Dusenberry*, 94 Ala. 413; *Louisville & N. R. Co. v. Mothershed*, 97 Ala. 261; *infra*, §§ 128, 129.

³² The injured servant may have an action against the fellow servant who was guilty of negligence causing the injury. The fellow-servant rule, or the contract between the injured servant and the master, does not affect the maintenance of the action, since its ground is the breach of a positive duty owed by one person to another. *Osborne v. Morgan*, 130 Mass. 102, overruling *Albro v. Jaquith*, 4 Gray (Mass.) 99; *Osborne v. Morgan*, 137 Mass. 1; *Mulchey v. Methodist Religious Soc.*, 125 Mass. 487; *Hinds v. Harbou*, 58 Ind. 121; *Hinds v. Overacker*, 66 Ind. 547; *Miller v. Staples*, 3 Colo. App.

§ 3. Construction of the act.

The act is remedial in its nature, and is to be liberally construed.

Although the act removes a common-law defense, and in that sense may be said to be in derogation of

93; *Wright v. Roxburgh*, 2 Macpherson, Ct. Sess. Cas. (3d Ser.) 748; *Degg v. Midland Ry. Co.*, 1 Hurl. & N. 773; *Swainson v. North-Eastern Ry. Co.*, 3 Exch. Div. 341; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Milligan v. Wedge*, 12 Adol. & E. 737; *Wiggett v. Fox*, 11 Exch. 832; *Foulkes v. Metropolitan D. Ry. Co.*, 4 C. P. Div. 267, 5 C. P. Div. 157. Master and servant cannot be made codefendants, *Parsons v. Winchell*, 5 Cush. (Mass.) 592; *Warax v. Cincinnati, N. O. & T. P. Ry. Co.*, 72 Fed. 637. Contra, *Wright v. Compton*, 53 Ind. 337; *Charman v. Lake Erie & W. R. Co.*, 105 Fed. 449, and cases cited. But by the Colorado act (Sess. Laws 1893, c. 77, § 5) they may be joined.

There seems to be no reason why, since the passage of the act, the injured servant should not have his right of action against the negligent servant as fully as at common law. The act only affects the right of action between servant and master. The question has as yet been left open. *Toomey v. Donovan*, 158 Mass. 232; *Engel v. New York, P. & B. R. Co.*, 160 Mass. 260, 262. There could be no action if the servant were instantly killed. *Consolidated Hand-Method L. M. Co. v. Bradley*, 171 Mass. 127.

³³ At common law, when a master, for breach of a duty which he owed a stranger, has suffered judgment, he may recover the amount paid in an action against his servant, whose negligence caused the liability. The action sounds in contract, and the fact that he is responsible for his servant's acts is not of itself enough to make him a joint tortfeasor, and bar his recovery. *Inhabitants of Lowell v. Boston & L. R. Corp.*, 23 Pick. (Mass.) 24; *White v. Phillipston*, 10 Metc. (Mass.) 108, 111; *Inhabitants of Westfield v. Mayo*, 122 Mass. 100, 109; *Smith v. Foran*, 43 Conn. 244.

No distinction is made whether the master's liability is imposed by statute or by common law. *Gray v. Boston Gas Light Co.*, 114 Mass. 149; *River Wear Com'rs v. Adamson*, 2 App. Cas. 743.

The master should be able to recover against the negligent servant, since the passage of the act. *Respondeat superior* is the ground of the master's liability to stranger or to servant. The act, having
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the common law, yet its manifest purpose is to remedy a hardship, and by the weight of authority it should therefore receive a liberal construction.³⁴ But what is a liberal construction in questions of this character depends very much upon the sympathy or cast of mind of the person construing it. Lord Esher, M. R., says as to this: "There have always been, I think, two schools of thought in relation to cases of this kind,—that is to say, cases of injury happening to workmen while in the employment of their masters. The view of one school

removed the defense of common employment, has not changed the ground of the master's liability, or imposed a greater duty to guard the conduct of the servants whom he employs. The act has not made him a joint tortfeasor with the negligent servant, when he would not be so considered at common law. It has not been decided whether this action may be maintained (*Consolidated Hand-Method L. M. Co. v. Bradley*, 171 Mass. 127), but it has been held that the damages in such an action cannot be the amount of the judgment and costs which the plaintiff was compelled to pay, in those cases under the Massachusetts act, where the damages are to be assessed with reference to the degree of culpability (*Id.*).

³⁴ *Ryalls v. Mechanics' Mills*, 150 Mass. 190; *Daly v. New Jersey S. & I. Co.*, 155 Mass. 1; *Stewart v. Louisville & N. R. Co.*, 83 Ala. 493; *Mitchell v. Colorado M. & E. Co.*, 12 Colo. App. 277; *Vetaloro v. Perkins*, 101 Fed. 393; *Morrison v. Baird*, 10 Rettie, Ct. Sess. Cas. (4th Ser.) 271; *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357; *Gibbs v. Great Western Ry. Co.*, 12 Q. B. Div. 208.

"Being in derogation of the common law, the inference is that the terms of the act clearly import the changes intended, and their operation will not be enlarged by construction further than may be necessary to effectuate the manifest ends. Notwithstanding, a narrow and restrictive view of the act should not be taken. In its construction the court should consider its objects, have regard to the intentions of the legislature, and take a broad view of its provisions, commensurate with the proposed purposes." *Mobile & B. Ry. Co. v. Holborn*, 84 Ala. 133, 134.

"As the act is in derogation of the common law, it must be strictly construed." *Hodges v. Standard Wheel Co.*, 152 Ind. 680.

has been that, in order to prevent injustice to masters, the construction of these enactments relating to masters and workmen should be narrowed, and that they should be construed as strictly as possible. The view of the other school is that master and workmen are not really on an equal footing; that, if there is danger in the employment, it does not exist with regard to the master, but only in the case of the workman; and that the workman is not on an equal footing, because he must run the risk or give up his employment. These two schools of thought may easily be traced in the cases on the subject of master and workmen. * * * [The act's] object clearly was to alter the law in favour of the workman, and to extend the liability of masters. Since the passing of the statute, it appears to me that the same conflict of views which existed previously has still been in operation. Some judges have construed the act as narrowly as possible, with a view to preventing what they conceived to be injustice to masters. Other judges have considered that the act, having been passed to extend the liability of masters in favour of workmen, ought to be construed liberally in favour of the workman. * * * I think that those who belonged to the former school have approached the enactment with too much timidity, and, on the other hand, have been too bold in interfering with the verdict of juries."³⁵ Thus, although both jurisdictions declare that the act is to be liberally construed, yet in somewhat similar cases it will be found that the English courts go further than those of Massachusetts; for example, in favoring the servant.³⁶

³⁵ Walsh v. Whiteley, 21 Q. B. Div. 371, 374.

³⁶ Smith v. Baker [1891] App. Cas. 325; Caron v. Boston & A. R.

The statute must be read as a whole,³⁷ and constant reference made to the common-law adjudications.³⁸

Prior construction followed.

The first act was that of England, and it was the result of much discussion and investigation both by lawyers and laymen. The first American act—that of Alabama—became a law five years afterwards, when the chief provisions of the English act had been construed. As the subsequent acts have substantially adopted the English phraseology, the familiar rule that thereby they also adopted the construction placed upon it has been generally followed. “Our statute, as far as it goes, is a substantial copy of the English act entitled the ‘Employers’ Liability Act,’ some of the provisions of which had previously received a judicial construction. Its enactment by the legislature, in substantially the same language, is persuasive of a legislative adoption of that construction.”³⁹

Co., 164 Mass. 523; *Morgan v. Hutchins*, 38 Wkly. Rep. 412; *Hale v. Cheney*, 159 Mass. 268; *Wild v. Waygood* [1892] 1 Q. B. 783; *Joseph v. Whitney*, 177 Mass. 176.

³⁷ *Ryalls v. Mechanics’ Mills*, 150 Mass. 190; *Louisville, N. A. & C. Ry. Co. v. Wagner*, 153 Ind. 420.

³⁸ *Sagers v. Nuckolls*, 3 Colo. App. 95; *Wilson v. Louisville & N. R. Co.*, 85 Ala. 269, 272.

³⁹ *Mobile & B. Ry. Co. v. Holborn*, 84 Ala. 133, 134. Also, *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240; *Birmingham R. & E. Co. v. Allen*, 99 Ala. 359, 371; *Mellor v. Merchants’ Mfg. Co.*, 150 Mass. 362, 363; *Sagers v. Nuckolls*, 3 Colo. App. 95; *Mitchell v. Colorado M. & E. Co.*, 12 Colo. App. 277.

“We cannot deal with the latter quite on the same footing as if the legislature had framed it in their own language, used for the first time. We must assume that they were content with the expounded meaning of the words which they adopted.” *Ryalls v. Mechanics’ Mills*, 150 Mass. 190, 193.

It has no retrospective operation.

Several of the acts particularly state that it shall apply only to injuries happening after its passage, and is not to affect any legal proceedings pending at the time it takes effect.⁴⁰ The liability is to be determined by the law in effect at the date of the injury.⁴¹ The act is not a part of the contract of service, and applies to all persons standing in the relation of master and servant, whether that relation was created by a contract made before or after its passage.⁴²

§ 4. Constitutionality of the act.

The act is constitutional, and is neither a violation of the fourteenth amendment nor a regulation of interstate commerce.

The question whether the employers' liability acts, taken in their application to all persons affected by them, are constitutional, has not been determined. This was a point left open when the effect of the Indiana act was considered in a recent case. The court held that this act did not violate either the state or federal constitution, so far as it affected employes of railroad

⁴⁰ 43 & 44 Vict. c. 42; Acts Mass. 1887, c. 270, § 1 (see Rev. Laws, c. 106, § 71); Mills' Ann. St. 1891-96, § 1511a; Sess. Laws Colo. 1893, c. 77, § 1. "Where, after the passage of this act, personal injury," etc. Burns' Rev. St. Ind. 1901, § 7087. "The provisions of this act, however, shall not apply to any injuries sustained before it takes effect, nor shall it affect in any manner any suit or legal proceedings pending at the time it takes effect."

⁴¹ Dunlap v. Barney Mfg. Co., 148 Mass. 51. Also, Kelley v. Boston & M. R. R., 135 Mass. 448; Wright v. Southern Ry. Co., 80 Fed. 260.

⁴² Alabama G. S. R. Co. v. Carroll, 97 Ala. 126, 137

companies, and thus treated the act as capable of severance for the purpose of testing the contention.⁴³

The statutes of the several states regulating the liability of railroads for injuries suffered by their employes have, however, often been questioned in the courts, and invariably held constitutional.⁴⁴ It has been urged under the fourteenth amendment to the constitution of the United States that such provisions deprive the railroad of its property without due process of law, that they deny to railroads the equal protection of the laws, and that they are void as a regulation of interstate commerce.

"The plain answer [to the contention that property is taken without due process of law] is that the liability imposed by the [Kansas] law of 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it cannot be successfully contended that the state may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its powers in this respect by their charters.

* * * The hardship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment. * * * The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or its directors. But the same hardship and injus-

⁴³ *Pittsburgh, C., C. & St. L. Ry. Co. v. Montgomery*, 152 Ind. 1; *Pittsburgh, C., C. & St. L. Ry. Co. v. Hosea*, 152 Ind. 412; *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531; *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 351. See *St. Louis, I. M. & St. P. Ry. Co. v. Paul*, 173 U. S. 404.

⁴⁴ *Infra*, § 73, note 1.

tice, if there be any, exist where the company, without any wrong or negligence on its part, is charged for injuries to passengers. * * * The law of 1874 extends this doctrine and fixes a like liability upon railroad companies where injuries are subsequently suffered by employes, though it may be by the negligence or incompetency of a fellow servant in the same general employment and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt."⁴⁵

The objection that such statutes deprive railroad companies of the equal protection of the laws has likewise been overruled. "It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. * * * And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. * * * But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of

⁴⁵ *Missouri P. Ry. Co. v. Mackey*, 127 U. S. 205, 208; *Minneapolis & St. L. Ry. Co. v. Herrick*, 127 U. S. 210; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 566; *St. Louis, I. M. & St. P. Ry. Co. v. Paul*, 173 U. S. 404; *Peirce v. Van Dusen* (C. C. A.) 78 Fed. 693; *Pittsburgh, C., C. & St. L. Ry. Co. v. Montgomery*, 152 Ind. 1, and cases cited.

their employes, as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories."⁴⁶ The question is whether the classification or discrimination made is purely arbitrary, or has some basis in that which has a reasonable relation to the object sought to be accomplished.⁴⁷ "The state may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion."⁴⁸

It would seem, therefore, that the several acts were not invalid under either of the objections noted. The object sought to be accomplished is the better protection of employes, and Massachusetts, Alabama, and Colorado have passed statutes which relate not to railroads only, but to all employers of industrial servants, without selecting any particular classes, judging that the

⁴⁶ *Missouri P. Ry. Co. v. Mackey*, 127 U. S. 205, 209; *Minneapolis & St. L. Ry. Co. v. Herrick*, 127 U. S. 210; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209; *Orient Ins. Co. v. Daggs*, 172 U. S. 557; *St. Louis, I. M. & St. P. Ry. Co. v. Paul*, 173 U. S. 404; *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348; *Clark v. Kansas City*, 176 U. S. 114; *Pittsburgh, C., C. & St. L. Ry. Co. v. Montgomery*, 152 Ind. 1; *Indianapolis Union Ry. Co. v. Houlihan (Ind.)* 60 N. E. 943.

⁴⁷ *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96; *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150.

⁴⁸ *Magoun v. Illinois T. & S. Bank*, 170 U. S. 283, 294.

necessity exists where the employers are natural persons as well as corporations. Indiana does not go so far, and her act applies only to corporations. This is a proper exercise of legislative discretion, and the basis upon which the classification proceeds certainly has a reasonable relation to the object to be attained.

Neither do the acts trench upon the control of commerce granted to the federal government. If the regulation of the rights and duties between master and servant is within the power of congress, until the power has been exercised the states may enact statutes affecting that relation, if these statutes are not directed against commerce. Thus, a statute which gives an action for death caused by wrongful act is valid. It "imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the state for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of accrued in the state,—whether on land or on water. General legislation of this kind, prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce."⁴⁹

Under state constitutions.

The objection has been taken to the Indiana act that it embraces more than one subject, all of which are

⁴⁹ *Sherlock v. Alling*, 93 U. S. 99, 103.

not expressed in the title; that it regulates the practice in courts of justice; and that it has not an equal or uniform operation throughout the state. These contentions have not prevailed.⁵⁰ In Colorado it was held that the act was unconstitutional because it gave an action to a personal representative for death, and the title, "An act concerning damages sustained by agents, servants, or employes," did not mention this subject, since the personal representative did not suffer "damages." On appeal, however, the decision was reversed, the court holding that the word "damages" in the title was synonymous with "injuries," and not to be taken in its technical meaning of "compensation"; therefore, the title included all the subjects found in the statute.⁵¹ In Alabama it has been held that a statute which gave a remedy for the death of a minor caused by the wrongful act of a corporation or firm was unconstitutional, since it did not provide a like remedy against individuals.⁵²

§ 5. Effect of the act in federal courts.

In questions arising under the act, the federal courts follow

⁵⁰ Pittsburgh, C., C. & St. L. Ry. Co. v. Montgomery, 152 Ind. 1, and cases cited.

⁵¹ Mitchell v. Colorado M. & E. Co., 12 Colo. App. 277; Colorado M. & E. Co. v. Mitchell, 26 Colo. 284.

⁵² Smith v. Louisville & N. R. Co., 75 Ala. 449. But it is generally held that statutes which give a remedy for death caused by the wrongful act of a common carrier are a valid exercise of the police power, and merely provide a remedy which the common law failed to grant. Coosa River Steamboat Co. v. Barclay, 30 Ala. 120; Boston, C. & M. R. R. v. State, 32 N. H. 215; South-Western R. Co. v. Paulk, 24 Ga. 356. See, also, Richmond & D. R. Co. v. Freeman, 97 Ala. 289.

the decisions of the state courts so far as these construe the statute.

The relation existing between a master and his servant is a matter of general law, upon which the federal courts follow their own judgment, and are not bound by the decisions of the state within whose borders they sit. "The question as to what is a matter of local, and what of general, law, and the extent to which in the latter this court should follow the decisions of the state courts, has often been presented. The unvarying rule is that in matters of the latter class this court, while leaning towards an agreement with the view of the state courts, always exercises an independent judgment; and so unvarying has been the course of decision that the question of the responsibility of a railroad corporation for injuries caused to or by its servants is one of general law. * * * But, passing beyond the matter of authorities, the question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the states to legislate and change the rules of the common law in this respect as in the others; but in the absence of such legislation the question is one determinable only by the general principles of that law."⁵³

⁵³ *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 370, 378; *Hough v. Texas & P. R. Co.*, 100 U. S. 213; *Burgess v. Seligman*, 107 U. S. 20, 33; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349; *Northern* (34)

But where the state has enacted a statute which changes the common law, the constructions placed upon it by the state courts "are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is."⁵⁴ All matters which the statute covers, such as the limit of damages, or whether the burden of proving contributory negligence rests on the defendant, or this negligence is a bar or a mitigation of the plaintiff's claim, will be followed by the federal court; but if the statute itself, or the necessary construction of it, does not lay down the rule, the federal courts will exercise their own judgment.⁵⁵

P. R. Co. v. Peterson (C. C. A.) 51 Fed. 182; Newport News & M. V. Co. v. Howe (C. C. A.) 52 Fed. 362; Eells v. St. Louis, K. & N. W. Ry. Co., 52 Fed. 903; Chicago, R. I. & P. R. Co. v. Stahley (C. C. A.) 62 Fed. 363; Northern P. R. Co. v. Hogan (C. C. A.) 63 Fed. 102; McPeck v. Central Vt. R. Co. (C. C. A.) 79 Fed. 590; Evey v. Mexican Cent. R. Co. (C. C. A.) 81 Fed. 294. But see Kerlin v. Chicago, P. & St. L. R. Co., 50 Fed. 185; Becker v. Baltimore & O. R. Co., 57 Fed. 188.

⁵⁴ Burgess v. Seligman, 107 U. S. 20, 33; Northern P. R. Co. v. Herbert, 116 U. S. 642; Chicago, M. & St. P. Ry. Co. v. Artery, 137 U. S. 507; Martin's Adm'r v. Baltimore & O. R. Co., 151 U. S. 673; Oakes v. Mase, 165 U. S. 363; Byrne v. Kansas City, Ft. S. & M. R. Co. (C. C. A.) 61 Fed. 605; Griffin v. Overman Wheel Co. (C. C. A.) 61 Fed. 568; Central Trust Co. v. East Tennessee, V. & G. R. Co., 69 Fed. 353; Peirce v. Van Dusen (C. C. A.) 78 Fed. 693; New York, N. H. & H. R. Co. v. O'Leary (C. C. A.) 93 Fed. 737; Felton v. Bullard (C. C. A.) 94 Fed. 781.

⁵⁵ The limit of damages will not be exceeded. Farmers' L. & T. Co. v. Toledo, A. A. & N. M. R. Co., 67 Fed. 73. If the statute is a penal one, it cannot be enforced. Lyman v. Boston & A. R. Co., 70 Fed. 409. Contributory negligence. Western & A. R. Co. v. Roberson (C. C. A.) 61 Fed. 592; Byrne v. Kansas City, Ft. S. & M. R. Co., 61 Fed. 605.

§ 6. Jurisdiction of federal courts.

The jurisdiction of the federal courts sitting in admiralty is exclusive over torts committed on the high seas, and concurrent over torts committed on navigable waters within the territorial limits of the state. In the latter case the federal courts will enforce the act.

The boundaries and the sovereignty of a state extend a marine league from the shore, and within this limit the state laws are operative, and the state courts have jurisdiction.⁵⁶ Beyond this limit are the "high seas,"⁵⁷ over which neither state laws nor courts have effect.⁵⁸ "A vessel at sea is considered a part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality. All on board are endowed and subject accordingly.

* * * The jurisdiction of the local sovereign over a vessel and over those belonging to her in the home port and aboard on the sea is, according to the law of nations, the same.⁵⁹ On this principle it was held that a New York statute giving a remedy for death by wrongful act was effectual to give this remedy where the death was caused on board a ship on the high seas,

⁵⁶ *Com. v. Manchester*, 152 Mass. 230; *Manchester v. Massachusetts*, 139 U. S. 240; *Peabody v. Hamilton*, 106 Mass. 217; *In re Humboldt Lumber Manuf'rs' Ass'n*, 60 Fed. 428; *Humboldt Lumber Manuf'rs' Ass'n v. Christopherson*, 19 C. C. A. 481, 73 Fed. 239, 46 L. R. A. 264, note.

⁵⁷ *United States v. Rodgers*, 150 U. S. 249.

⁵⁸ *Armstrong v. Beadle*, 5 Sawy. 484, Fed. Cas. No. 541; *The E. B. Ward*, 16 Fed. 255; *The Alaska*, 130 U. S. 201.

⁵⁹ *Wilson v. McNamee*, 102 U. S. 572, 574; *The E. B. Ward*, 17 Fed. 456; *Crapo v. Kelly*, 16 Wall. (U. S.) 610; *Wildenhus's Case*, 120 U. S. 1, 12.

which was owned in New York, and that the action could be maintained in the New York courts.⁶⁰

The admiralty and maritime jurisdiction of the federal courts extends to injuries originating and consummated upon navigable waters either within or without the territory of a state.⁶¹ As to injuries occurring without the territory of the state, the state courts have, of course, no jurisdiction. As to the injuries within the state limits, both federal and state courts may have jurisdiction in the absence of federal legislation giving an exclusive jurisdiction.⁶² The test of admiralty jurisdiction is the location of the injury; it must be upon navigable waters, and, if the federal court may thus hear the case, it will decide upon admiralty rules, unless there be a controlling state statute.⁶³

The federal court will enforce such a statute of the state by an action *in personam*,⁶⁴ and, if the statute permits a lien, it may be enforced by a libel *in rem*.⁶⁵ It has not been decided that a libel *in rem* may be brought in cases where the statute does not itself give a lien, but

⁶⁰ McDonald v. Mallory, 77 N. Y. 546.

⁶¹ Waring v. Clarke, 5 How. (U. S.) 451.

⁶² American Steamboat Co. v. Chase, 16 Wall. (U. S.) 522; Sherlock v. Alling, 93 U. S. 99. Injury on a New York ship on the high seas, McDonald v. Mallory, 77 N. Y. 546.

⁶³ The Harrisburg, 119 U. S. 199. See Rundell v. La Campagnie Generale Transatlantique (C. C. A.) 100 Fed. 655.

⁶⁴ City of Norwalk, 55 Fed. 98; McCullough v. New York, N. H. & H. R. Co. (C. C. A.) 61 Fed. 364; In re Humboldt Lumber Manuf'rs' Ass'n, 60 Fed. 428; Humboldt Lumber Manuf'rs' Ass'n v. Christopherson (C. C. A.) 73 Fed. 239; Robinson v. Detroit & C. S. N. Co. (C. C. A.) 73 Fed. 883. But see Butler v. Boston & S. S. Co., 130 U. S. 527.

⁶⁵ The Corsair, 145 U. S. 344; The Oregon, 73 Fed. 846.

the cases upon this subject are conflicting. Where the injury happens on the high seas, the better view seems to be that a federal court should enforce the statute of the state where the vessel is owned in an action *in personam*, on the theory which the courts of New York have adopted,—that the vessel is a part of the home territory and carries the home laws with her.⁶⁶

§ 7. Conflict of laws.

An action for personal injuries is transitory in its nature, but, wherever the case is heard, the rights of the parties are to be determined by the law which existed in the jurisdiction where the injury was received at the time of its occurrence.

When an injury has been sustained in one state or country, the right of action thereby created may be enforced in any jurisdiction where service on the defendant can be obtained. It is well settled that an action for personal injury is transitory, and not local, in its nature, and thus it is not necessary that the suit should be brought in the jurisdiction where the wrong was committed. In such cases the question of what system of law is to govern is determined in accordance with the general rule that the law of the forum to which the plaintiff has submitted himself shall control as to the form and incidents of the remedy, but that the law of the place where the injury was received shall govern the substantive rights of the parties.

At common law.

If the common law of the place where the injury was received gives a right of action against the defendant,

⁶⁶ The *E. B. Ward*, 17 Fed. 456.

or denies such right, the courts of the forum will decide the action in accordance with it, although they may have taken a different view of the common law in cases arising in their own jurisdiction. "As between the states of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties."⁶⁷ If actionable by the law of the place where the wrong was done, it is actionable everywhere, and, "if lawful or free from liability there, is not actionable elsewhere."⁶⁸

The common law of another jurisdiction need not be proved as a fact, since there is a presumption that the common law is the same elsewhere as in the forum. But this presumption, it is believed, extends only to those countries of whose system of law the court may take judicial notice, and know that it belongs either to the common law or to the civil. There is no presumption entertained by a Massachusetts court that France or Texas applies the same law, since it knows that they are countries governed by the civil law; but Texas may presume that Mexico, having the same system of jurisprudence, views the civil law in the same light as her own

⁶⁷ *Walsh v. New York & N. E. R. Co.*, 160 Mass. 571, 573; *Howarth v. Lombard*, 175 Mass. 570; *Dennick v. Central R. Co.*, 103 U. S. 11; *Texas & P. Ry. Co. v. Cox*, 145 U. S. 593; *Leazott v. Boston & M. R. Co.*, 70 N. H. 5.

⁶⁸ *Glynn v. Central R. Co.*, 175 Mass. 510, 513; *Le Forest v. Tolman*, 117 Mass. 109. See note 72.

courts. If the foreign law is of a different system of jurisprudence, there is no presumption, and it must be proved as a fact; if it is of the same system of jurisprudence, then any variance between it and the law of the forum, if material, must likewise be proved as a fact. If a foreign statute affects the rights of the parties, this is a fact which must be proved.⁶⁹

Under statutes.

In all jurisdictions the common law which denied the survival of an action of tort, and denied the right

⁶⁹ *McIntyre v. Boston & M. R. R.*, 163 Mass. 189; *Young v. Boston & M. R. R.*, 168 Mass. 219; *Kelley v. Kelley*, 161 Mass. 111, 114; *Jackson v. Pittsburgh, C., C. & St. L. Ry. Co.*, 140 Ind. 241; *Kahl v. Memphis & C. R. Co.*, 95 Ala. 337; *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126; *Louisville & N. R. Co. v. Williams*, 113 Ala. 402. The complaint must set up facts bringing the case within the foreign statute. *Davidow v. Pennsylvania R. Co.*, 85 Fed. 943.

If the law of a foreign country is of the same system of jurisprudence, it will be presumed, in the absence of evidence, to have the same rules as that of the former. The law of Mexico presumed to be the same as that of Texas. *Mexican Cent. Ry. Co. v. Glover* (C. C. A.) 107 Fed. 356; *Mexican Cent. Ry. Co. v. Marshall* (C. C. A.) 91 Fed. 933; *Castleman v. Jeffries*, 60 Ala. 380; *Peet v. Hatcher*, 112 Ala. 514. But there is no presumption that the common law prevails all over the world. *Aslanian v. Dostumian*, 174 Mass. 328, 331; *Savage v. O'Neil*, 44 N. Y. 298. But see *Hanna v. Grand Trunk Ry. Co.*, 41 Ill. App. 116; *Johnson v. Chambers*, 12 Ind. 102.

"The law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof." *Lamar v. Micou*, 114 U. S. 218, 223; *Davidow v. Pennsylvania R. Co.*, 85 Fed. 943. But the supreme court in exercising its appellate, and not its original jurisdiction, follows the rule as to judicial notice of the laws of other states as laid down in the jurisdiction from which the case is appealed. *Hanley v. Donoghue*, 116 U. S. 1; *Renaud v. Abbott*, 116 U. S. 277.

to recover damages for a death caused by wrongful act, has been changed by statute in these particulars. The right of railroad employes to recover for personal injuries has also been a subject of general legislation. The cases, therefore, which determine the effect of these statutes or the enforcement of rights acquired under them in another jurisdiction are authorities on the questions presented by the employers' liability acts. A state statute has no extraterritorial force, and it is not the statute, but rights which have become vested under it, which are to be enforced.⁷⁰ "The fundamental question is whether there is a substantive right originating in one state, and a corresponding liability which follows the person against whom it is sought to be enforced into another state."⁷¹

The law in force at the place where the injury happened, at the time it happened, fixes the rights of the parties, and, if this law is statute law rather than the common law, the statute must be followed.⁷² If the injury

⁷⁰ *Young v. Boston & M. R. R.*, 168 Mass. 219; *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 134; *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169; *Vawter v. Missouri Pacific Ry. Co.*, 84 Mo. 679.

⁷¹ *Howarth v. Lombard*, 175 Mass. 570, 572.

⁷² *Davis v. New York & N. E. R. Co.*, 143 Mass. 301; *Higgins v. Central New England & W. R. Co.*, 155 Mass. 176; *Glynn v. Central R. Co.*, 175 Mass. 510; *Kahl v. Memphis & C. R. Co.*, 95 Ala. 337; *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 134; *Helton v. Alabama Midland R. Co.*, 97 Ala. 275; *Louisville & N. R. Co. v. Williams*, 113 Ala. 402; *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169; *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439; *Dennick v. Central R. Co.*, 103 U. S. 11; *Northern Pacific R. Co. v. Babcock*, 154 U. S. 190; *Stewart v. Baltimore & O. R. Co.*, 168 U. S. 445. See, also, *Easton v. Houston & T. C. Ry. Co.*, 32 Fed. 893; *Boston & M. R. Co. v. McDuffey (C. C. A.)* 79 Fed. 934; *Davidow v. Pennsylvania R. Co.*,

resulted in death, the place where the death occurred has no effect upon the rights of the parties, which are still to be determined by the law of the place of injury.⁷³ Nor can it be said that the law of the place where the contract of service was made should affect the rights of a servant who is injured in another jurisdiction. The contract of service does not incorporate as one of its terms the provisions of the act. "The only office of the contract under section 2590 of the Code is the establishment of a relation between them of master and servant; and it is upon that relation—that incident or consequence of the contract—that our statute operates.

* * * Finding the relation, the statute imposes certain duties and liabilities on the parties, wholly regardless of the stipulations of the contract as to the rights of the parties under it, and, it may be, in the teeth of such stipulations. It is the purpose of the statute, and must be the limit of its operation, to govern persons standing in the relation of master and servant to each

85 Fed. 943; *Law v. Western Ry. of Alabama*, 91 Fed. 817; *Selma, R. & D. R. Co. v. Lacey*, 49 Ga. 106.

When the cause of action arose in a foreign country, the laws of that country govern. *Smith v. Condry*, 1 How. (U. S.) 28; *Petersen v. The Lamington*, 87 Fed. 752; *Evey v. Mexican Cent. Ry. Co. (C. C. A.)* 81 Fed. 294; *Mexican Cent. Ry. Co. v. Marshall (C. C. A.)* 91 Fed. 933.

Burns' Rev. St. Ind. 1901, § 7086. It is provided, if an employe of a railroad whose line is operated both in Indiana and another state is injured in another state, it shall not be competent for the defendant to prove the laws of that state in defense to an action brought in Indiana under this act.

⁷³ *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126; *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46; *De Harn v. Mexican Nat. Ry. Co.*, 86 Tex. 68.

other in respect of their conduct in certain particulars within the state of Alabama."⁷⁴ In the case from which this quotation is taken, the contract of service was entered into and partly performed in Alabama, the injury was received in Mississippi, and the suit was brought in Alabama. Under the Alabama act the plaintiff could recover, but under the common law of Mississippi he could not, and it was held that the law of Mississippi governed.

In this case, also, the argument was urged that, as the negligent act which resulted in injury in Mississippi was committed and began to operate in Alabama, the law of the latter state should, on that ground, fix the rights of the parties. It was held, however, that the Mississippi law governed, and the court said: "It is admitted, or at least cannot be denied, that negligence of duty unproductive of damnifying results will not authorize or support a recovery. Up to the time the train passed out of Alabama no injury had resulted. For all that occurred in Alabama, therefore, no cause of action whatever arose. The fact which created the right to sue—the injury without which confessedly no action would lie anywhere—transpired in the state of Mississippi. It was in that state, therefore, necessarily, that the cause of action, if any, arose; and whether a cause of action arose and existed at all or not must in all reason be determined by the law which obtained at the time and place when and where the fact which is

⁷⁴ Alabama G. S. R. Co. v. Carroll, 97 Ala. 126, 137; Illinois Cent. R. Co. v. Ihlenberg (C. C. A.) 75 Fed. 873; Boston & M. R. Co. v. McDuffey (C. C. A.) 79 Fed. 934; Christian v. Columbus & R. Ry. Co., 79 Ga. 460; Whitford v. Panama R. Co., 23 N. Y. 465.

relied on to justify a recovery transpired.”⁷⁵ This ruling has been questioned on the ground that neither negligence without injury nor injury without negligence is sufficient to create a cause of action, and of the two greater weight should be given to the law of the place where the negligence occurred than to that of the place of the injury. But the injury is a fact definite as to time and place, and about the existence of which there is no question. If there is to be a cause of action at all, it is because the injury resulted from negligence, and negligence in existence at the time of the injury, either because it then first arose, or had theoretically continued because it had not been cured or avoided. But the time and place where the negligence was committed are in the majority of cases indefinite and incapable of certain proof, and at the moment when it first exists it is only by a fiction that it can be said that the resulting injury occurred, so as to complete the cause of action at that place. It would seem that the court was quite right in establishing the plainer rule that the law of the place of injury governed.

The Indiana act provides that when an employe, a citizen of Indiana, shall be injured in another state, the defendant cannot set up in a suit brought in Indiana the laws of the place of injury as a defense.⁷⁶ A state has the power to pass such a statute in favor of its own citizens.⁷⁷

⁷⁵ Alabama G. S. R. Co. v. Carroll, 97 Ala. 126, 134; Chicago, St. L. & N. O. R. Co. v. Doyle, 60 Miss. 977; Rundell v. La Campagnie Generale Transatlantique (C. C. A.) 100 Fed. 655.

⁷⁶ Burns' Rev. St. 1901, § 7086.

⁷⁷ Whitford v. Panama R. Co., 23 N. Y. 465.

Enforcement of rights under foreign statutes.

The forum is less ready to enforce rights which depend upon the statutes of a foreign jurisdiction than it is to give a remedy for rights which are created by the foreign common law. The reason, perhaps, is that the main principles of the common law are everywhere the same, though somewhat differently considered or applied, but that a statute is dictated by a peculiar and local necessity or policy which may be antagonistic to the policy of the forum. There has accordingly been some divergence of opinion on the question whether the rights acquired under statutes in the state of injury will be enforced in the forum if substantially similar rights are not recognized by the domestic law.

In England it is said that the laws of the forum and of the foreign state must concur to give a cause of action;⁷⁸ but the federal courts have gone to the other extreme, and have laid down the sounder rule that the rights acquired may be enforced regardless of the remedy provided by the forum, and, in deciding the question presented under a statute giving a remedy for death by wrongful act, say: "It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the state where the offense was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is, indeed, a right dependent solely on the statute of the state; but where the act is done for

⁷⁸ The Halley, L. R. 2 P. C. 193, 204; The Moxham, 1 Prob. Div. 107, 111; Phillips v. Eyre, L. R. 6 Q. B. 1, 28. See, also, Anderson v. Milwaukee & St. P. Ry. Co., 37 Wis. 321; Ash v. Baltimore & O. R. Co., 72 Md. 144; Vawter v. Missouri Pacific Ry. Co., 84 Mo. 679.

which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Whenever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties."⁷⁹

But the greater number of states have taken a middle ground between these two views, and enforce the rights acquired under such foreign statutes as are substantially similar to their own and not contrary to their policy.⁸⁰ The Massachusetts court says: "In cases other than penal actions, the foreign law, if not con-

⁷⁹ *Dennick v. Central R. Co.*, 103 U. S. 11, 18; *Texas & P. Ry. Co. v. Cox*, 145 U. S. 593; *Huntington v. Attrill*, 146 U. S. 657, 675; *Northern Pacific R. Co. v. Babcock*, 154 U. S. 190.

⁸⁰ *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169; *Morris v. Chicago, R. I. & P. Ry. Co.*, 65 Iowa, 727; *Knight v. West Jersey R. Co.*, 108 Pa. 250; *Bruce's Adm'r v. Cincinnati R. Co.*, 83 Ky. 174; *Texas & P. Ry. Co. v. Richards*, 68 Tex. 375 (see *Texas & P. Ry. Co. v. Cox*, 145 U. S. 593); *Stoeckman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503; *Needham v. Grand Trunk Ry. Co.*, 38 Vt. 294.

trary to our public policy, or to abstract justice or pure morals, or calculated to injure the state or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that consistently with our own forms of procedure and law of trials we can do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this state or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction.”⁸¹ In a later case it is said: “Possibly, when it becomes material to scrutinize the question more closely, the English law will be found to be more consistent with our views.”⁸²

⁸¹ Higgins v. Central New England & W. R. Co., 155 Mass. 176, 180; Howarth v. Lombard, 175 Mass. 570.

⁸² Walsh v. New York & N. E. R. Co., 160 Mass. 571, 572.

A Massachusetts administratrix sued for the death of her intestate, a resident here, which occurred in New York while he was a passenger on defendant's train. The action was brought under the New York statute providing for compensation for a death by wrongful act, to be recovered by the personal representative for the benefit of the widow and next of kin, and distributed according to the law in relation to the distribution of personal estates; the jury to apportion the damages, not exceeding \$5,000, with reference to the pecuniary injuries resulting from such death to the wife and next of kin. The court said: “By the common law, and by the laws of this commonwealth, no action could be brought against the railroad company for negligently causing the death of the plaintiff's intestate. This is conceded; and the plaintiff rests her case wholly on the statute of New York. If this be a penal statute, it cannot be enforced beyond the territory in and for which it was enacted. If it gives a

Statutes giving compensation for death caused by wrongful act are not penal laws, inasmuch as it is not

new and peculiar system of remedy, by which rights of action are transferred from one person to another in a mode which the common law does not recognize, and which is not in conformity with the laws or practice of this commonwealth, there is an equally insuperable objection to pursuing such a remedy in our courts. * * * For the reason, therefore, that the right of action which the New York statute gives to the personal representative of the deceased in that state is not a right of property passing as assets of the deceased, but is a specific power to sue created by their local law, it does not pass to the plaintiff as administratrix in Massachusetts, and this suit cannot be maintained by her." *Richardson v. New York Cent. R. Co.*, 98 Mass. 85.

An administrator brought an action for injuries, resulting in the death of his intestate, received in Connecticut. By the Connecticut statute, such an action died with the person injured, and his administrator might maintain a special action to recover a sum, limited in amount, for the benefit of certain persons in specified proportions. The plaintiff did not sue under this statute, but sought to recover by virtue of a Massachusetts statute permitting survival of actions, and it was held that, as the action did not survive by the common law or by statute in Connecticut, it will not survive by virtue of a statute of Massachusetts. *Davis v. New York & N. E. R. Co.*, 143 Mass. 301.

In *Higgins v. Central New England & W. R. Co.*, 155 Mass. 176, it was held that an administrator could recover compensation for the death of his intestate in Connecticut under a statute of that state which provided that actions for injury to the person, whether the same do or do not instantaneously or otherwise result in death, shall survive to his administrator, and the damages, not exceeding \$5,000, shall inure to the benefit of the widow and heirs of the deceased. The ground of the decision is that the deceased had a "right of action at the instant when he was *vivus et mortuus*, and that by express provisions of law it is made to survive and to pass to his administrator," and this is an asset which the administrator may ask the aid of Massachusetts courts in reducing to possession. "Suits brought to enforce rights of action which the deceased had, and which survived, and passed from him to his administrator, differ essentially from those which this court refused to entertain in *Richardson v. New York Cent. R. Co.*, 98 Mass. 85, and in *Davis v. New York & N.* (48)

their purpose to punish an offense against the public justice of the state, but to afford a private remedy to a person injured, and therefore rights acquired under them may be elsewhere enforced.⁸³ But statutes which assess damages without reference to the degree of culpability, or providing, like several Massachusetts acts, a minimum and a maximum penalty, have sometimes been so considered.⁸⁴

E. R. Co., 143 Mass. 301. In *Richardson's Case* an administrator appointed here sought to enforce in our courts a cause of action which his intestate never had, which had not passed to the administrator by succession, and which the statutes of another state had caused to spring up at the death of the intestate, and had provided might be brought by and in the names of his personal representatives, for the exclusive benefit of his widow and next of kin. In *Davis' Case* the intestate had a right of action in his lifetime by the common law of the state of Connecticut, where he was injured; but by the law of Connecticut his right of action did not survive, and was extinguished at his death, while a penal action created by statute was substituted for it in that state." *Higgins v. Central New England & W. R. Co.*, 155 Mass. 176.

If the substantive right is one which is generally recognized, it will be enforced if not contrary to policy, although it varies from the Massachusetts view in detail. *Higgins v. Central New England & W. R. Co.*, 155 Mass. 176; *Walsh v. New York & N. E. R. Co.*, 160 Mass. 571; *Howarth v. Lombard*, 175 Mass. 570.

The Massachusetts rule that, if the right of action under the foreign statute may be regarded as an asset of the estate, it will be entertained, but, if it is merely a power to sue for a penalty, it cannot be enforced, is held also in Ohio and Kansas. *Woodward v. Michigan S. & N. I. R. Co.*, 10 Ohio St. 121; *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 48. See, also, *Ash v. Baltimore & O. R. Co.*, 72 Md. 144; *Vawter v. Missouri Pacific Ry. Co.*, 84 Mo. 679; *Oates v. Union Pacific Ry. Co.*, 104 Mo. 514.

⁸³ *Dennick v. Central R. Co.*, 103 U. S. 11; *Huntington v. Attrill*, 146 U. S. 657; *Northern Pacific R. Co. v. Babcock*, 154 U. S. 190; *Higgins v. Central New England & W. R. Co.*, 155 Mass. 176; *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169.

⁸⁴ *Lyman v. Boston & A. R. Co.*, 70 Fed. 409; *O'Reilly v. New York*

The statutes giving compensation for death by wrongful act are all taken from the same model, Lord Campbell's act, with some differences of detail, and are substantially similar. The differences are seldom serious enough to lead courts to refuse to enforce rights acquired under them.⁸⁵ Also the majority of the states have by special or general legislation modified the common-law rule of

& N. E. R. Co., 16 R. I. 388; *Adams v. Fitchburg R. Co.*, 67 Vt. 76; *Marshall v. Wabash R. Co.*, 46 Fed. 269; *Richardson v. New York Cent. R. Co.*, 98 Mass. 85; *Smith v. Louisville & N. R. Co.*, 75 Ala. 449. Contra, *Boston & M. R. R. v. Hurd* (C. C. A.) 108 Fed. 116; *Isola v. Webber*, 34 N. Y. Supp. 77; *Denver, S. P. & P. Ry. Co. v. Woodward*, 4 Colo. 162. See, also, *infra*, § 18, note 47.

⁸⁵ *Higgins v. Central New England & W. R. Co.*, 155 Mass. 176; *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169; *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439; *Kahl v. Memphis & C. R. Co.*, 95 Ala. 337; *Northern Pacific R. Co. v. Babcock*, 154 U. S. 190. See, also, *Northern Pacific R. Co. v. Mase* (C. C. A.) 63 Fed. 114; *Boston & M. R. Co. v. McDuffey* (C. C. A.) 79 Fed. 934; *Davidow v. Pennsylvania R. Co.*, 85 Fed. 943; *Law v. Western Ry. of Alabama*, 91 Fed. 817; *Morris v. Chicago, R. I. & P. Ry. Co.*, 65 Iowa, 727; *Nelson v. Chesapeake & O. R. Co.*, 88 Va. 971; *Wooden v. Western New York & P. R. Co.*, 126 N. Y. 10; *Herrick v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 11; *St. Louis, I. M. & S. Ry. Co. v. McCormick*, 71 Tex. 660.

Statutes are not dissimilar because exemplary damages are allowed under one, and not under the other, *Higgins v. Central New England & W. R. Co.*, 155 Mass. 176; or that a foreign statute permits a default and assessment of damages by the court, *Higgins v. Central New England & W. R. Co.*, 155 Mass. 176; or that jury are to apportion damages, rather than permit them to pass as assets, *Stewart v. Baltimore & O. R. Co.*, 168 U. S. 445 (contra, *St. Louis, I. M. & S. Ry. Co. v. McCormick*, 71 Tex. 660); or that it permits recovery against receivers, contrary to the domestic rule, *Texas & P. Ry. Co. v. Cox*, 145 U. S. 593; or that it regulates the assumption of risks by the servant, *Illinois Cent. R. Co. v. Ihlenberg* (C. C. A.) 75 Fed. 873; or that it permits a different party to bring the action, *infra*, c. 2, § 23.

As the courts of Kentucky and Indiana have concurrent jurisdiction
(50)

fellow service, and it cannot be said that these statutes are so dissimilar that courts will not enforce the rights they give. Nor should the difference in detail render them contrary to the policy of the forum. "To justify a court in refusing to enforce a right of action which accrued under the laws of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens."⁸⁶

In all that affects the substantive right of action, the party to sue and the limit or measure of damages prescribed by the statute,⁸⁷ the requirement of notice or the special limitation of action, if imposed by the statute⁸⁸ the foreign law controls. But whatever affects the remedy, process, practice, evidence, and damages and limitation of action, if not defined in the statute, is determined by the law of the forum.⁸⁹

tion over torts on the Ohio river, an action may be maintained in either state under the local law. *Sherlock v. Alling*, 44 Ind. 184, 93 U. S. 99; *Memphis & C. P. Co. v. Pikey*, 142 Ind. 304.

⁸⁶ *Herrick v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 11, 14.

⁸⁷ *Infra*, § 23.

⁸⁸ *Infra*, § 36.

⁸⁹ *Hoadley v. Northern Transportation Co.*, 115 Mass. 304. Pleadings and practice, *South Carolina R. Co. v. Nix*, 68 Ga. 572; elements of damage, *Higgins v. Central New England & W. R. Co.*, 155 Mass. 176; evidence upon defendant's negligence, *Helton v. Alabama Midland R. Co.*, 97 Ala. 275, and *Jones v. Chicago, St. P., M. & O. Ry. Co.*, 80 Minn. 488; rule as to contributory negligence, *Chandler v. New York, N. H. & H. R. Co.*, 159 Mass. 589.

Under Alabama procedure, a foreign corporation cannot be sued save upon causes of action arising within the state. *Central R. & B. Co. v. Carr*, 76 Ala. 393.

§ 8. Master and servant.

The act applies to persons standing in the relation of master and servants to each other.

This relation is created when one consents to perform labor or services for another, and subjects himself to the right of the other to control and direct the manner of doing the work.

The act concerns only those persons who stand in the relation of master and servant to each other.⁹⁰ It does not define who these persons are, or state what is necessary to create the relation, but, finding the relation, it imposes certain rights and liabilities upon the parties to it.⁹¹ The rules of the common law are then to determine when persons become masters and servants to each other, and the act has not affected them. A servant has been defined as "one who is engaged not merely in doing work or service for another, but who is in his service, usually upon or about the premises of his employer, and subject to his direction and control therein, and who is generally liable to be dismissed."⁹² Or as it has been more tersely said: "A servant is a person subject to the command of his master as to the manner in which he shall do his work."⁹³ These definitions also describe the master: He is "one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct, the means also, or,

⁹⁰ *Dane v. Cochrane Chemical Co.*, 164 Mass. 453; *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357, 364; *Robertson v. Russell*, 12 Rettle, Ct. Sess. Cas. (4th Ser.) 634.

⁹¹ *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 137.

⁹² *Heygood v. State*, 59 Ala. 49, 51.

⁹³ *Yewens v. Noakes*, 6 Q. B. Div. 530, 532.

as it has been put, 'retains the power of controlling the work.' ⁹⁴

The elements which go to form the relationship are a contract of hiring, express or implied, the payment of wages, the right to direct or control the servant, and the right to discharge him.⁹⁵ In considering the master's liability to his servant for an injury received in the course of the employment, the contract of hiring is of no importance. If it is an express contract, any terms which limit the master's liability are contrary to statutes passed on the subject in many of the states, and the usual contract of hiring does not contain any stipulations on this subject. The implied contract of hiring is raised from the circumstances of the employment, and is merely a promise to pay as much as the services shall be worth. A contract, as such, is not essential to the establishment of the relation. An intention to become a servant and an intention to become a master are all that is required. From this intention there may be implied a contract to pay for the services, and the relation may be established. The phrase "contract of service," used by the courts in dealing with injuries sustained by a servant, and the mutual rights and duties which are considered terms of this contract, is entirely distinct from the implied contract to pay for services rendered, and is merely a fiction, a convenient phrase, in which to state the incidents of the relation and the duties created by it.

The payment of wages is not essential to the creation of the relation, since a volunteer may be a servant. The

⁹⁴ Pollock, Torts (3d Ed.) 72.

⁹⁵ Swainson v. North Eastern Ry. Co., 47 Law J. Exch. 375.

wages need not be paid necessarily by the person who is really the master, or may be in the form of gratuities, or may be paid by the piece instead of by the time employed.⁹⁶ The power of discharge also is not conclusive; usually the person possessing it is the master, although the employer of an independent contractor may reserve to himself the right of discharging the latter's servants.⁹⁷ All these elements are evidence of the existence of the relation, but no one of them is conclusive.

The unfailing test of the existence of the relation is the power of direction or control. It must be possessed by a master, though it may not be exercised, or exercised through the hands of an agent. The right of direction covers not only the general objects or method of the work, but extends to every detail of it. The discretion of the servant is constantly subject to this control,—a test which stamps him as a servant and not an independent contractor.⁹⁸

⁹⁶ *Laughter v. Pointer*, 5 Barn. & C. 547; *Quarman v. Burnett*, 6 Mees. & W. 499; *Charles v. Taylor*, 3 C. P. Div. 492; *Wiggett v. Fox*, 25 Law J. Exch. 188.

⁹⁷ *Reedie v. London & N. W. Ry. Co.*, 4 Exch. 244.

⁹⁸ "It is not necessarily of controlling importance that the laborer is paid for his service so much for given quantity of work done instead of wages for the time employed. The former method of compensation might be adopted, and yet such control and direction over the execution of the work by him for whom it is being done might be reserved as to create the relation of master and servant." *Harris v. McNamara*, 97 Ala. 181.

"If the corporation was actually doing the work of unloading the vessel, having charge and direction of it through its upper servants, authorized to control the laborers engaged in it, and was also receiving pay from the party bound to bear the expense of it, those engaged in it were its servants. It cannot make any difference whether the men employed were hired by it for the month or year,

A volunteer may become a servant, and subject himself to the duties and the rights attending the relationship if his services are accepted by the master, who personally, or through his duly-authorized agent, acquiesces in the employment.⁹⁹

"The general servant of one person may become the servant of another by submitting himself to the control and direction of the other. In such a case the servant becomes the fellow servant of the servant of the person under whose control he comes; and neither his general master nor his special master is liable if he is injured by the negligence of one of the other servants. * * * In order to produce that result, the circumstances * * * must be such as to show conclusively that the

or job, or whether they received a fixed sum, or a portion of the sum received by the defendant from the schooner, if they were entitled to look to the defendant, and not to the schooner, for their compensation." *Daley v. Boston & A. R. Co.*, 147 Mass. 101, 112.

The keeper of a railroad boarding house is not a servant of the company because the latter withholds part of the wages of its employes to pay for their board. *Doyle v. Union Pacific Ry. Co.*, 147 U. S. 413.

Hospital managed by railroad, *Wabash R. Co. v. Kelley*, 153 Ind. 119.

A workman employed by "butty men," who enter into a contract with mine owners to get out coal at so much per ton, is a servant of the mine owner. *Brown v. Butterley Coal Co.*, 2 Times Law R. 159; *Drennen v. Smith*, 115 Ala. 396; *Morrison v. Baird*, 10 Rettle, Ct. Sess. Cas. (4th Ser.) 271. See, also, section 9.

⁹⁹ *Degg v. Midland Ry. Co.*, 26 Law J. Exch. 171; *Barstow v. Old Colony R. Co.*, 143 Mass. 535; *Robertson v. Boston & A. R. Co.*, 160 Mass. 191; *Tennessee C., I. & R. Co. v. Hayes*, 97 Ala. 201; *Stevens v. Chamberlin* (C. C. A.) 100 Fed. 378. But if the only knowledge of his employment is possessed by one having no power to hire servants for the master, he is not a servant. *Stalcup v. Louisville, N. A. & C. Ry. Co.*, 16 Ind. App. 584.

servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master, for the purposes of the common employment."¹⁰⁰ The control of his special master must be actual, and if the servant, though told to put himself under the control of another, does not in fact do so, he remains the servant of his general master. Thus, where a servant who is engaged in loading cotton into a lighter by arrangement of his master ought, when he comes on board the vessel, to obey the directions of the latter's officer as to placing the bale, but without awaiting such directions places it where he pleases, he does not become a servant of the vessel.¹⁰¹ This case is to be distinguished from those where a servant is told to follow the directions of another in furthering his master's business, as where the messenger of an express company is told to

¹⁰⁰ *Morgan v. Smith*, 159 Mass. 570, 571. "The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired." *Coughlan v. City of Cambridge*, 166 Mass. 268, 277; *Johnson v. Lindsay* [1891] App. Cas. 371; *Wild v. Waygood* [1892] 1 Q. B. 783; *Union S. S. Co. v. Claridge* [1894] App. Cas. 185; *Kimball v. Cushman*, 103 Mass. 194; *Ward v. New England Fibre Co.*, 154 Mass. 419; *Hasty v. Sears*, 157 Mass. 123; *Reagan v. Casey*, 160 Mass. 374; *Samuelian v. American T. & M. Co.*, 168 Mass. 12; *Hardy v. Shedden Co. (C. C. A.)* 78 Fed. 610.

If, through false representations, he is induced to work for another, believing that he is doing the work of his proper master, he does not become the servant of the former, and "the defendant cannot thus impose upon him the incidental and implied obligations of a contract of service into which he has not entered." *Kelly v. Johnson*, 128 Mass. 530.

¹⁰¹ *Hickey v. Merchants & M. Transp. Co.*, 152 Mass. 39.

conform to the directions of the conductor of the train, on the ground that the servant is engaged in the business of his master, and is not transferred to the business of another, and the power of the latter does not extend to a right to discharge him for disobedience.¹⁰²

The question of who has the right to control and the consequent existence of the relation of master and servant is for the jury upon all the circumstances of the case.¹⁰³

If at the time of the injury the negligent person was not a servant of the one sought to be charged, the relationship may be established by subsequent ratification, which will relate back to the time of the injury, and impose liability on the master.¹⁰⁴

§ 9. Independent contractor.

An independent contractor is a person employed to do certain work for another according to his own methods and discretion, being accountable to his employer only for the results.

He is not a servant to whom the act applies.

An independent contractor is one who, having generally an independent trade or employment of his own, enters into a contract with another to do a certain piece of work under specified conditions, but according to his own methods and under his own direction, being responsible to his employer only for the results. The line which distinguishes him from the servant is that the

¹⁰² *Union Pacific Ry. Co. v. Kelley*, 4 Colo. App. 325; *Central R. of New Jersey v. Stoermer*, 51 Fed. 518.

¹⁰³ *Union S. S. Co. v. Claridge* [1894] App. Cas. 185; *Kimball v. Cushman*, 103 Mass. 194; *Preston v. Knight*, 120 Mass. 5.

¹⁰⁴ *Dempsey v. Chambers*, 154 Mass. 330.

details of the work are not subject to his employer's direction and control.¹⁰⁵ The relation of master and servant does not exist between them, and the employer con-

¹⁰⁵ "If the person employed to do the work carries on an independent employment and acts in pursuance of a contract with his employer by which he has agreed to do the work on certain specified terms, in a particular manner, and for a specified price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer, and given to the contractor. But on the other hand, if work is done under a general employment, and is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient." *Connors v. Hennessey*, 112 Mass. 96; *Hexamer v. Webb*, 101 N. Y. 377; *Atlantic Transport Co. v. Coneys* (C. C. A.) 82 Fed. 177; *Casement v. Brown*, 148 U. S. 615; *Lawrence v. Shipman*, 39 Conn. 586; *Wabash, St. L. & P. Ry. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696; *Stephen v. Thurso Police Com'rs*, 3 *Rettie*, Ct. Sess. Cas. (4th Ser.) 535, 542.

"If there is a contract between them so that the person doing the work or doing the act complained of, has a right to say to the employer, 'I will agree to do it, but I shall do it after my own fashion; I shall begin the wall at this end and not at the other,' then the relation of master and servant does not exist, and the employer is not liable. But if the employer has a right to say to the person employed, 'You shall do it in this way; that is to say, not only shall you do it by virtue of your agreement with me, but you shall do it as I direct you to do it,' then the law of master and servant applies, and the master is responsible." *Bramwell*, L. J., *Evidence on Employers' Liability*, Parliamentary Papers 1876, vol. 10, p. 58.

"The method of payment is not the test, but the test is whether Smith was in the exercise of a distinct and independent employment, using his own means and methods for accomplishing his work, and not being under the immediate supervision and control of his employer." *Morgan v. Smith*, 159 Mass. 570, 574. See, also, *Eldred v. Mackie*, 178 Mass. 1; *City of Ft. Wayne v. Christie*, 156 Ind. 172.

sequently is not liable for the acts of his contractor, unless he personally interferes in the conduct of the work, or has employed an incompetent contractor, or the nature of the work to be done is unlawful or creates a nuisance.¹⁰⁶

The servants of an independent contractor are not servants of the employer nor fellow servants of those engaged by him; and this is true although the employer in his contract may have stipulated for the right to discharge the servants of the contractor. The employer is not liable for any negligence of the contractor or of any of his servants.¹⁰⁷ But he owes to the servants of the contractor the same duty that he owes to persons rightfully on his premises, and for an injury caused by his negligence or the negligence of his servants in regard to the premises or appliances furnished by him they may hold him responsible.¹⁰⁸

Since the independent contractor or his servants are not at common law the servants of the employer, the latter is not liable for the negligence of any of them

¹⁰⁶ See cases above cited, and *Stalder v. City of Huntington*, 153 Ind. 354. Servant of independent contractor agreeing to be bound by regulations of employer is not latter's servant. *Fitzpatrick v. Evans* [1901] 1 K. B. 756; *Harding v. City of Boston*, 163 Mass. 14.

¹⁰⁷ *Knight v. Fox*, 5 Exch. 721; *Johnson v. Lindsay* [1891] App. Cas. 371; *Cameron v. Nystrom* [1893] App. Cas. 308; *Rome & D. R. Co. v. Chasteen*, 88 Ala. 591; *Vincennes Water Supply Co. v. White*, 124 Ind. 376; *Stalder v. City of Huntington*, 153 Ind. 354; *Harkins v. Standard Sugar Refinery*, 122 Mass. 400; *Burrill v. Eddy*, 160 Mass. 198.

¹⁰⁸ *Mulchey v. Methodist Religious Soc.*, 125 Mass. 487; *Conlon v. Eastern R. Co.*, 135 Mass. 195; *Toomey v. Donovan*, 158 Mass. 232; *Perkins v. Furness*, 167 Mass. 403; *Toledo B. & M. Co. v. Bosch* (C. C. A.) 101 Fed. 530.

under the acts of England, Alabama, or Indiana.¹⁰⁹ The acts of Massachusetts and Colorado contain the special provision that whenever an employer enters into a written or verbal contract with an independent contractor to do part of the employer's work, or such contractor makes a subcontract, such contract or subcontract shall not bar the liability of the employer for injuries to the employes of such contractor or subcontractor by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or furnished by him, and if such defect arose or had not been discovered or remedied through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition.¹¹⁰

Under this section the servant of an independent contractor may recover from the employer for injuries received through the instrumentalities furnished by the employer for the contractor's use.¹¹¹ It does not en-

¹⁰⁹ *Nicolson v. Macandrew*, 15 Rettie, Ct. Sess. Cas. (4th Ser.) 854; *Sweeney v. Robert Duncan & Co.*, 19 Rettie, Ct. Sess. Cas. (4th Ser.) 870; *McGinn v. Pilling* (1881) 72 Law T. 156; *Scarborough v. Alabama Midland Ry. Co.*, 94 Ala. 497. See *Dane v. Cochrane Chemical Co.*, 164 Mass. 453.

The coal mines regulation act, requiring owners to supervise all persons employed by them, does not have the effect of extending the employers' liability act to the case of a servant of an independent contractor injured by the latter's negligence in sinking a shaft, so that he may sue the owner. *Marrow v. Flimby & B. M. C. & F. B. Co.* [1898] 2 Q. B. 588.

¹¹⁰ Acts Mass. 1887, c. 270, § 4; Rev. Laws, c. 106, § 76; Sess. Laws Colo. 1893, c. 77, § 3; Mills' Ann. St. 1891-96, § 1511c. See *infra*, c. 4.

¹¹¹ *Toomey v. Donovan*, 158 Mass. 232.

large the liability of the employer at common law in such a case. It has not given the servant of an independent contractor the right to recover against the employer for the negligence of the contractor himself or of his other servants.¹¹² It has not made the servant of the contractor a servant of the employer or treated him as such, and therefore such a one cannot have the benefit of any of the other provisions of the act, either those relating to the action in case of the death of a servant or to damages, since the act applies only to those whom the common law has said are servants.

§ 10. Who are servants.

Any person having the will to enter the service may become a servant. The act excepts domestic and menial servants from its operation.

Since the existence of the relation depends upon the intention to render and receive service, an infant or married woman may become a servant,¹¹³ although the contract may be voidable. Upon the question whether a convict becomes a servant of the person to whom the state lets his services, the decisions are conflicting, but the better opinion seems to be that he is not a servant, since he has no choice whether to enter or quit the employment.¹¹⁴ Public officers who are required by a stat-

¹¹² *Dane v. Cochrane Chemical Co.*, 164 Mass. 453.

¹¹³ *King v. Boston & W. R. Corp.*, 9 Cush. (Mass.) 112; *Harris v. McNamara*, 97 Ala. 181; *Widrig v. Taggart*, 51 Mich. 103; *Emerson v. Blonden*, 1 Esp. 142. See, also, *infra*, § 82.

¹¹⁴ *Buckalew v. Tennessee C., I. & R. Co.*, 112 Ala. 146; *Hartwig v. Bay State S. & L. Co.*, 43 Hun (N. Y.) 425; *Boswell v. Barnhart*, 96 Ga. 521. *Contra*, *Dalheim v. Lemon*, 46 Fed. 225. And see *Henderson v. Boynton*, 173 Mass. 217, 220.

ute defining their duties to be appointed by a city or town are not agents or servants for whose acts the municipality is responsible, "for the reason that the municipal corporation has no control over their tenure of office, nor, as a general rule, any authority to direct the mode in which their duties are to be performed."¹¹⁵

The acts of Alabama and Colorado use the words "servants or employes," and do not except any classes of servants from their operation, and domestic as well as industrial servants may claim their benefits.¹¹⁶ The Indiana act applies only to "railroads and other corporations, except municipal," and the servants of individuals, partnerships and municipal corporations are therefore not affected by it.¹¹⁷ The Massachusetts act does "not apply to injuries caused to domestic servants or farm laborers by other fellow employes;"¹¹⁸ and the

¹¹⁵ *Sullivan v. City of Holyoke*, 135 Mass. 273, 277; *Hafford v. City of New Bedford*, 16 Gray (Mass.) 297; *Kimball v. City of Boston*, 1 Allen (Mass.) 417; *City of New Bedford v. Inhabitants of Taunton*, 9 Allen (Mass.) 207; *Barney v. City of Lowell*, 98 Mass. 570.

A special policeman, under a statute, is not the servant of the person at whose request he is appointed. *Healey v. Lothrop*, 171 Mass. 263, 178 Mass. 151. See *Dickson v. Waldron*, 135 Ind. 507.

¹¹⁶ Civ. Code Ala. 1896, § 1749 (2590); Sess. Laws Colo. 1893, c. 77; *Mills' Ann. St.* 1891-96, § 1511a.

¹¹⁷ *Burns' Rev. St.* 1901, § 7083.

¹¹⁸ Acts Mass. 1887, c. 270, § 7; Rev. Laws, c. 106, § 79. A domestic servant generally lives in the master's house, *Graham v. Thomson*, 1 Sess. Cas. Scot. (1st Ser.) 309. A head gardener has been held a menial, not a domestic servant, *Nowlan v. Ablett*, 2 Crompt. M. & R. 54. A "servant in husbandry" in England has been held to include "a man employed to dig in the ground," *Morgan v. London G. O. Co.*, 13 Q. B. Div. 832; a wagoner, *Lilley v. Elwin*, 11 Q. B. 742; a maid who does both housework and outdoor work may be, *Ex parte Hughes*, 23 Law J. M. Cas. 138, and *Clark v. McNaught*, Arkley, 33; a farm agent is not, *Davies v. Berwick*, 3 El. & El. 549.

English act applies only to workmen, and says that "‘workman’ means a railway servant and any person to whom the employers’ and workmen’s act of 1875 applies."¹¹⁹ That statute says: "The expression ‘workman’ does not include a domestic or menial servant, but * * * means any person who, being a laborer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labor," works for an employer.

§ 11. Who are masters.

Any person or association having the will to enter the relation may become a master.

The act applies to all employers of industrial servants.

Persons of legal capacity to contract may become masters, and infants and married women may also become masters, although their contracts may be voidable by them.¹²⁰ Partnerships or any partner may employ-servants for the conduct of the business,¹²¹ and it is well settled that corporations may also become masters.¹²² As certain of the acts have excepted special classes of servants from their benefits, the masters of such servants are of course not affected by them.¹²³

¹¹⁹ 43 & 44 Vict. c. 42, § 8.

¹²⁰ *Supra*, § 10; *Bodine v. Killeen*, 53 N. Y. 93. When a man conducts his own business, and the negligence is his own, the act does not apply to him. *Bruce v. Barclay*, 17 Rettie, Ct. Sess. Cas. (4th Ser. 811.

¹²¹ *Beckham v. Drake*, 9 Mees. & W. 79; *Smith v. Cisson*, 1 Colo. 29. All the partners are liable for negligence, but the nonjoinder of a partner is not a defense. *Ashworth v. Stanwix*, 30 Law J. Q. B. 183; *Brady v. Norcross*, 172 Mass. 331.

¹²² *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202.

¹²³ *Supra*, § 10.

Receivers.

A receiver is an officer of the court, appointed by it to take charge of the affairs of a person, partnership, or corporation. His powers are limited, and defined by the order appointing him, and the custody and possession of the property are vested in him. His appointment does not have the effect of transferring the title to the property, nor does it dissolve the corporation. When he conducts the business of a corporation, his liability for injuries sustained by a servant depends upon the authority under which he acts and the measure of control which he exercises.

When, having been appointed by a court, he is authorized by it to carry on the business of the corporation, although he is an officer of the court, he is liable in his official capacity for injuries suffered by an employe, and the damages will be satisfied from the funds in his hands in accordance with the direction of the court.¹²⁴ He is not an agent or officer of the corporation over which he is appointed, nor does he stand in its place. The corporation still exists, but is not an-

¹²⁴ *Ohio & M. R. Co. v. Davis*, 23 Ind. 553; *Meara's Adm'r v. Holbrook*, 20 Ohio St. 137; *Winbourn's Case*, 30 Fed. 167; *Clyde v. Richmond & D. R. Co.*, 59 Fed. 394; *Memphis & C. R. Co. v. Hoechner* (C. C. A.) 67 Fed. 456; *Cincinnati, N. O. & T. P. Ry. Co. v. Gray* (C. C. A.) 101 Fed. 623; *Cowdrey v. Galveston, H. & H. R. Co.*, 93 U. S. 352; *Burnham v. Bowen*, 111 U. S. 776. See, also, *Paige v. Smith*, 99 Mass. 395; *Nichols v. Smith*, 115 Mass. 332.

The court may permit a receiver to recompense a deserving employe who has been injured, although there is no liability. *Missouri Pacific Ry. Co. v. Texas & P. Ry. Co.*, 33 Fed. 701, 41 Fed. 319; *Thomas v. East Tennessee, V. & G. Ry. Co.*, 60 Fed. 7; *Easton v. Houston & T. C. Ry. Co.*, 39 Fed. 65.

swerable for his acts.¹²⁵ But this is true only where the receiver is in absolute control of the operations of the corporation, for if the corporation continues in control or management of its business, or if it operates jointly with the receiver, it may be held responsible.¹²⁶

If the receiver is personally negligent, he may, as any other person, be held liable in his individual capacity.¹²⁷ If he carries on the business without the authority of the court, he is liable individually; and even in a case where the court authorized him to lease a connecting railroad, but did not authorize him to carry it on as receiver, he was held personally responsible.¹²⁸

When the cause of action accrued before a receiver

¹²⁵ *Ohio & M. R. Co. v. Davis*, 23 Ind. 553; *Bell v. Indianapolis, C. & L. R. Co.*, 53 Ind. 57; *Metz v. Buffalo, C. & P. R. Co.*, 58 N. Y. 61; *Meara's Adm'r v. Holbrook*, 20 Ohio St. 137; *Archambeau v. New York & N. E. R. Co.*, 170 Mass. 272; *Kansas Pacific Ry. Co. v. Searle*, 11 Colo. 1; *Klein v. Jewett*, 26 N. J. Eq. 474; *Brown v. Wabash Ry. Co.*, 96 Ill. 297; *Thurman v. Cherokee R. Co.*, 56 Ga. 376; *Turner v. Hannibal & St. J. R. Co.*, 74 Mo. 602; *Memphis & L. R. Ry. Co. v. Stringfellow*, 44 Ark. 322; *Brockert v. Central Iowa Ry. Co.*, 82 Iowa, 369; *Texas & P. Ry. Co. v. Huffman*, 83 Tex. 286; *Cowdrey v. Galveston, H. & H. R. Co.*, 93 U. S. 352; *Gableman v. Peoria, D. & E. Ry. Co.*, 82 Fed. 790; *Chamberlain v. New York, L. E. & W. R. Co.*, 71 Fed. 636.

¹²⁶ *Alexandria & W. R. Co. v. Brown*, 17 Wall. (U. S.) 445; *Pennsylvania R. Co. v. Jones*, 155 U. S. 333; *Memphis & C. R. Co. v. Hoechner (C. C. A.)* 67 Fed. 456.

Under certain statutes for fencing, the railroad is made liable notwithstanding the appointment of a receiver. *Ohio & M. R. Co. v. Fitch*, 20 Ind. 498; *Louisville, N. A. & C. R. Co. v. Cauble*, 46 Ind. 277; *Ohio & M. Ry. Co. v. Russell*, 115 Ill. 52; *Kansas Pacific Ry. Co. v. Wood*, 24 Kan. 619.

¹²⁷ *Cardot v. Barney*, 63 N. Y. 281; *Ryan v. Hays*, 62 Tex. 42; *Davis v. Duncan*, 19 Fed. 477.

¹²⁸ *Kain v. Smith*, 80 N. Y. 458.

was appointed, suit must be brought against the corporation, and not against him, although he may be admitted to defend.¹²⁹ But if the cause of action arose during the management of a receiver against him in his official capacity, an action will lie against a succeeding receiver properly appointed.¹³⁰

After a receiver has been discharged, an action does not lie against him in his official capacity for a cause of action arising during his management of the affairs of the corporation.¹³¹ Nor if the receiver has, on his discharge, turned over the property in his hands to a new corporation under the authority of the court, will that corporation be subject to an action for an injury happening during the receiver's management.¹³² But it is entirely proper for the court to provide in its decree that the purchaser of the property from the receiver shall take it subject to the liabilities of the receivership,¹³³ and even without such a provision, under some special circumstances, as where the earnings of the receivership have been put into permanent improvements,¹³⁴ the purchaser may be subjected to the claim. When the property is returned to the corporation over whose affairs the receiver was appointed, provision for the payment

¹²⁹ *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, 46 Fed. 508.

¹³⁰ *McNulta v. Lochridge*, 141 U. S. 327.

¹³¹ *Archambeau v. Platt*, 173 Mass. 249; *Davis v. Duncan*, 19 Fed. 477.

¹³² *Archambeau v. New York & N. E. R. Co.*, 170 Mass. 272.

¹³³ *Wabash R. Co. v. Stewart*, 41 Ill. App. 640; *Sloan v. Central Iowa Ry. Co.*, 62 Iowa, 728; *Central Trust Co. v. Denver & R. G. R. Co. (C. C. A.)* 97 Fed. 239.

¹³⁴ *Texas Pacific Ry. Co. v. Johnson*, 76 Tex. 421, 151 U. S. 81; *Mobile & O. R. Co. v. Davis*, 62 Miss. 271.

of claims may be made by the court;¹³⁵ and, when a receiver has been appointed at the instance of mortgage creditors, they thereby consent to have the claims of the receivership given precedence over their own.¹³⁶ In considering the liability of the receiver or of a taker from him, the decrees and orders of the court appointing him are conclusive.

The receiver may be responsible under the provisions of the act upon the same principles as he is made liable at common law.¹³⁷ The question has several times been presented whether the statutes relating to the liability of railroad corporations apply to receivers, and, though there is some conflict in the decisions, the better opinion is that they do.¹³⁸

¹³⁵ *Davis v. Duncan*, 19 Fed. 477.

¹³⁶ *St. Louis S. W. Ry. Co. v. Holbrook* (C. C. A.) 73 Fed. 112; *Kneeland v. American L. & T. Co.*, 136 U. S. 89.

¹³⁷ *McGhee v. Campbell* (C. C. A.) 101 Fed. 936; though the point was not taken.

¹³⁸ The Georgia and Texas statutes are held not to apply to receivers. *Henderson v. Walker*, 55 Ga. 481; *Thurman v. Cherokee R. Co.*, 56 Ga. 376; *Campbell v. Cook*, 86 Tex. 630; *Central Trust Co. v. East Tennessee, V. & G. Ry. Co.*, 69 Fed. 353; *Allen v. Dillingham* (C. C. A.) 60 Fed. 176.

The Ohio, Kansas, Minnesota, and Iowa statutes are held to apply to receivers. *Hornsby v. Eddy* (C. C. A.) 56 Fed. 461; *Rouse v. Hornsby* (C. C. A.) 67 Fed. 219; *Peirce v. Van Dusen* (C. C. A.) 78 Fed. 693; *Mikkelson v. Truesdale*, 63 Minn. 137; *Sloan v. Central Iowa Ry. Co.*, 62 Iowa, 728. See, *infra*, § 73, note 1.

Under statute for killing cattle, a receiver is liable. *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 26 Fed. 12; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 30 Fed. 344.

Receiver is liable under statute giving remedy for fires set by railroad companies. *Wall v. Platt*, 169 Mass. 398.

§ 12. Act applies to municipal corporations.

The act applies to municipal corporations.

No action lies against such a corporation, either at common law or under the act, for the negligent conduct of a public work unless expressly given by statute, but for negligence in the conduct of private works it is responsible.

A municipal corporation is "the incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and distinguishing feature of a municipal corporation proper."¹³⁹ In the execution of these powers and purposes the corporation may own and manage property; and a distinction has been made between property held and acts done in discharge of a public duty and the management of property for its own advantage and emolument, and not for the direct and immediate use of the public.

The general rule is well settled "that no private action, unless authorized by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage."¹⁴⁰

The erection and maintenance of public buildings, such as town houses, schools, almshouses, and the like,

¹³⁹ Dillon, *Mun. Corp.* (4th Ed.) § 20; *Mayor of Nashville v. Ray*, 19 Wall. (U. S.) 475; *Philadelphia v. Fox*, 64 Pa. 180; *Askew v. Hale County*, 54 Ala. 639; *Hill v. City of Boston*, 122 Mass. 344.

¹⁴⁰ *Hill v. City of Boston*, 122 Mass. 344, 345.

the establishment of fire departments, or other means for protecting the health and property of its citizens, are public duties which the corporation is bound by law to perform, and which are for the direct and immediate use of the public, and not for its own benefit. Neither a stranger nor a servant of the city or town who is injured through the negligent construction or management of such works can have an action against the municipality.¹⁴¹ The construction and repair of highways is equally a public duty, but an action for an injury received through a defect therein is given by express statute.

On the other hand, if any of these public works are devoted to a private rather than a strictly public purpose, then the municipality stands in the position of a private owner, and is liable to an action for its negligence. A voter who is injured by a defective stairway while attending a town meeting cannot recover;

¹⁴¹ Town hall, *Eastman v. Meredith*, 36 N. H. 295. Schools, *Bigelow v. Inhabitants of Randolph*, 14 Gray (Mass.) 541; *Hill v. City of Boston*, 122 Mass. 344; *Howard v. City of Worcester*, 153 Mass. 426. Hospital, *Benton v. Trustees of City Hospital*, 140 Mass. 13; *Hughes v. Monroe County*, 147 N. Y. 49. Almshouse, *Curran v. City of Boston*, 151 Mass. 505. Boston subway, *Mahoney v. City of Boston*, 171 Mass. 427.

A person injured by the discharge of fireworks at a public celebration has no action. *Findley v. City of Salem*, 137 Mass. 171. An employe cannot recover for a defect in the fire-signal system, *Pettingell v. City of Chelsea*, 161 Mass. 368; or a stranger injured by a hose carriage running into him. *Hafford v. City of New Bedford*, 16 Gray (Mass.) 297.

As to the distinction between property owned in a public and a private capacity, see *Scott v. Mayor of Manchester*, 2 Hurl. & N. 204, 210; *Western Sav. Fund Soc. v. City of Philadelphia*, 31 Pa. 185, 189; *Bailey v. Mayor of New York*, 3 Hill (N. Y.) 531, 539.

but if the hall has been rented for entertainments, and the town derives benefit from it, an action may be maintained by one who is injured through a defect in it.¹⁴² And likewise where the farm belonging to an almshouse is run for purposes of profit.¹⁴³ But the fact that some incidental benefit is derived from the conduct of a public work does not take it out of the general rule that the municipality is not liable for negligence in such work. Thus, the income derived from the labor of the inmates of a house of industry does not make the city a private owner, since the institution is not run for the purposes of profit.¹⁴⁴

“Because sewers are built and maintained partly for the private benefit and advantage of the abutters, who pay in part for such advantages, and because the charge of sewers is not an obligation imposed by law without the assent of the municipality, but voluntarily assumed, a municipality is liable to a private action for negli-

¹⁴² *Little v. City of Holyoke*, 177 Mass. 114; *Eastman v. Meredith*, 36 N. H. 295; *Oliver v. City of Worcester*, 102 Mass. 489; *Thayer v. City of Boston*, 19 Pick. (Mass.) 511.

¹⁴³ *Neff v. Inhabitants of Wellesley*, 148 Mass. 487.

¹⁴⁴ *Curran v. City of Boston*, 151 Mass. 505. Or that land owned by city will become more valuable by the removal of a gravel bank, *McCann v. City of Waltham*, 163 Mass. 344; or by laying out a street through it, *Taggart v. City of Fall River*, 170 Mass. 325; or that sales of crushed stone are made, *Collins v. Inhabitants of Greenfield*, 172 Mass. 78, and *Murphy v. Inhabitants of Needham*, 176 Mass. 422; or when the profits received are to be devoted to another public purpose, *Mahoney v. City of Boston*, 171 Mass. 427. But if the public work is undertaken, not as a public duty, but from private motives, as repairing portion of a street railway location, which the railway might have done, the city is liable. *Collins v. Inhabitants of Greenfield*, 172 Mass. 78.

gence in building or maintaining them."¹⁴⁵ Water works owned by a city are placed upon the same ground;¹⁴⁶ and, where the city owns gas or electric works from which it derives a revenue, it is treated as a private owner and responsible for its negligence.¹⁴⁷

A distinction has been taken between agents of the municipality appointed under and deriving their authority from a statute, and over whose acts the municipality has no control,¹⁴⁸ and agents appointed by the corporation to perform for it the duties imposed upon it.¹⁴⁹ In the former case no action will lie for their negligence, but in the latter there may be a recovery.

¹⁴⁵ *Coan v. City of Marlborough*, 164 Mass. 206, 208; *Joyce v. City of Worcester*, 140 Mass. 245; *Conroy v. Inhabitants of Clinton*, 158 Mass. 318; *Hennessy v. City of Boston*, 161 Mass. 502; *Driscoll v. City of Fall River*, 163 Mass. 105; *Norton v. City of New Bedford*, 166 Mass. 48; *McCoy v. Inhabitants of Westborough*, 172 Mass. 504.

¹⁴⁶ *Connolly v. City of Waltham*, 156 Mass. 368; *Coughlan v. City of Cambridge*, 166 Mass. 268; *Powers v. City of Fall River*, 168 Mass. 60.

¹⁴⁷ *Scott v. Mayor of Manchester*, 1 Hurl. & N. 59, 2 Hurl. & N. 204; *Mayor of City of New York v. Furze*, 3 Hill (N. Y.) 612; *Bodge v. Philadelphia*, 167 Pa. 492. Municipality is a private owner as to parks. *Jones v. City of New Haven*, 34 Conn. 1; *Hewison v. City of New Haven*, 37 Conn. 475. See, also, *Cowley v. Mayor of Sunderland*, 6 Hurl. & N. 565; *Clark v. Manchester*, 62 N. H. 577; *City of Philadelphia v. Gavagnin* (C. C. A.) 62 Fed. 617.

¹⁴⁸ See section 10, note 115; *McCann v. City of Waltham*, 163 Mass. 344; *Jensen v. City of Waltham*, 166 Mass. 344; *Taggart v. City of Fall River*, 170 Mass. 325; *Collins v. Inhabitants of Greenfield*, 172 Mass. 78; *Murphy v. Inhabitants of Needham*, 176 Mass. 422. But see *City Council of Sheffield v. Harris*, 101 Ala. 564.

¹⁴⁹ *Doherty v. Inhabitants of Braintree*, 148 Mass. 495. See *Blelling v. City of Brooklyn*, 120 N. Y. 98; *City of Denver v. Williams*, 12 Colo. 475.

Charitable corporations.

A private corporation, having no capital stock or provision for making profits and paying dividends, whose funds are derived from public or private charity, and held in trust by it for strictly charitable purposes, is not liable to an action for injuries sustained through the negligence of its employees.¹⁵⁰ But if the corporation is not obliged to devote its funds to charitable purposes, although that is its object, and may sell its property and divide the proceeds, or if the members derive some benefit or advantage from the corporation, then it cannot claim any exemption from the responsibility attaching to private individuals.¹⁵¹

A steamship company which is by statute required to employ medical officers is not responsible for their negligence in performing their duties;¹⁵² nor is a railway which maintains a hospital for its injured employees liable for the carelessness of its surgeons if due care has been used in selecting competent men.¹⁵³

Act applies to municipal corporations.

The Indiana act excepts municipal corporations from its operation;¹⁵⁴ but no exception is found in the other

¹⁵⁰ McDonald v. Massachusetts General Hospital, 120 Mass. 432; Benton v. Trustees of City Hospital, 140 Mass. 13.

¹⁵¹ Davis v. Central Congregational Soc., 129 Mass. 367; Donnelly v. Boston Catholic Cemetery Ass'n, 146 Mass. 163; Chapin v. Holyoke Y. M. C. A., 165 Mass. 280.

¹⁵² O'Brien v. Cunard S. S. Co., 154 Mass. 272.

¹⁵³ Pittsburgh, C., C. & St. L. Ry. Co. v. Sullivan, 141 Ind. 83; Wabash R. Co. v. Kelley, 153 Ind. 119; Eighth v. Union Pacific Ry. Co., 93 Iowa, 538; Union Pacific Ry. Co. v. Artist (C. C. A.) 60 Fed. 365; Pierce v. Union Pacific Ry. Co. (C. C. A.) 66 Fed. 44.

¹⁵⁴ Burns' Rev. St. 1901, § 7083.

acts, and it is held that they apply to cities and towns, and they would apply to charitable corporations which are in many ways treated as analogous to municipal corporations.¹⁵⁵ The municipality may rely on the same defense which it might urge in a common-law action,—that the negligence arose in the performance of a public work, from which no profit or advantage was derived.

§ 13. There must of necessity be actual employment.

The relation of master and servant, so far as it affects the right of a servant to recover for injuries, exists only while the servant is actually engaged in the service of his master or is within the reasonable range of his control.

A servant working from day to day for a master may be said in a popular sense to continue, during all the hours of that time, in his employment; but it is only during a certain portion of each day that he is bound to render service to his master and to subject himself to the latter's direction and control in regard to it. At other times he is his own master, and may occupy himself as he sees fit, either for business or pleasure. The rights and duties incident to the relation apply only while the servant is under the master's power of control and is performing services for him. At other times he is a stranger, with the rights and duties of a stranger. Thus, in one case the plaintiff was employed in the freight department of a railroad company, not under a contract for any stated period, but from day to day, and went to and from his work daily on the defendant's

¹⁵⁵ Coughlan v. City of Cambridge, 166 Mass. 268, and cases above cited; Murphy v. Inhabitants of Needham, 176 Mass. 422; City Council of Sheffield v. Harris, 101 Ala. 564.

trains. He had a special ticket which entitled him to ride upon the trains at any time. When he finished work at six o'clock on Saturday night, he rode to his home, and then, after supper, went over the defendant's road on a trip of his own in no way connected with the service of the defendant, and returning on the defendant's train, and using his special ticket, was injured by the negligence of the engineer. The court said that "it is clear that a person may at one time be an employe when passing over a railroad, and at another time, in passing over the same road, be a passenger, though continuing all the while, in a popular sense, in the employment of the railroad company. The ticket on which the plaintiff's intestate was riding was not a mere gratuity. It furnished part of the consideration by which he was induced to enter the employment of the defendant. A ticket was given to him each month, and it contained more rides than were necessary in traveling to and from his work. It is expressly conceded that persons holding these tickets could use them for their own private interest or pleasure; and we think the result must be that the plaintiff's intestate held towards the defendant the relation of a passenger at the time when he was injured."¹⁵⁶

The exact moment of time when the servant ceases to be his own master and comes within the range of his master's power of control is a matter of fact to be determined from the circumstances of the particular case.

¹⁵⁶ Doyle v. Fitchburg R. Co., 162 Mass. 66, 70; Washburn v. Nashville & C. R. Co., 3 Head (Tenn.) 638; State v. Western Maryland R. Co., 63 Md. 433; Dickinson v. West End Street Ry. Co., 177 Mass. 365.

It is "for the jury to say, from the nature of the employment, the manner of engaging the hands, the usual modes of transacting such a business, and the other circumstances of the case, whether the service had or had not ceased at the time of the accident."¹⁵⁷

If a general rule were to be laid down, it might perhaps be that the employment begins when the servant enters premises or trains in the control of his master for the purpose of reaching the particular place where he is to work. The length of time before or after the hour for beginning work is not a guide. Thus, when a master, by special arrangement with his employes, or by a method of conducting his business which he has adopted, undertakes to transport his servants to or from their place of work, the employment begins and continues during that time.¹⁵⁸ If in going to or from his

¹⁵⁷ *Northwestern Packet Co. v. McCue*, 17 Wall. (U. S.) 508, 514.

¹⁵⁸ *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 291; *Holmes v. Great Northern Ry. Co.* [1900] 2 Q. B. 409; *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228; *Seaver v. Boston & M. R. R.*, 14 Gray (Mass.) 466; *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233; *O'Brien v. Boston & A. R. Co.*, 138 Mass. 387. See *Doyle v. Fitchburg R. Co.*, 162 Mass. 66.

A laundress injured while being driven by her employer's coachman to her place of work is in the employment of her master, and a fellow servant of the coachman, whether her conveyance is gratuitous, or part of her contract of employment. *McGuirk v. Shattuck*, 160 Mass. 45.

If servant takes the train voluntarily, he is not in the employment. *Georgia Pacific R. R. v. Propst*, 85 Ala. 203. See, also, *Russell v. Hudson River R. Co.*, 17 N. Y. 134; *Vick v. New York Cent. & H. R. R. Co.*, 95 N. Y. 267; *Ryan v. Cumberland Valley R. Co.*, 23 Pa. 384; *Abend v. Terre Haute & I. R. Co.*, 111 Ill. 202; *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417; *Kumler v. Junction R. Co.*, 33 Ohio St. 150; *Pool v. Chicago, M. & St. P. Ry. Co.*, 53 Wis. 658.

work the servant has to pass over premises which are owned or controlled by the master, he continues in the employment during that time. Thus, a servant engaged in repairing a bridge on which is a railroad track given over to the use of his employer, and over which he has to pass to get to or leave his place of work, is a fellow servant with one running a derrick car on this track, who injures him on his return to work at noon.¹⁵⁹ During the time that the servant has any duties to perform for the master, whether before or after the regular hours of work, he is in his employment.¹⁶⁰ Where the servant remains on the premises during the noon hour, he continues in the employment;¹⁶¹ but he cannot

¹⁵⁹ *Olsen v. Andrews*, 168 Mass. 261; *Indiana P. L. & R. Co. v. Neusbaum*, 21 Ind. App. 361; *Tennessee C., I. & R. Co. v. Hansford*, 125 Ala. 349. See, also, *Ewald v. Chicago & N. Ry. Co.*, 70 Wis. 420.

When the servant is permitted by an agreement between a railroad company and his master to pass over the company's tracks to get to his place of work, but his master has no control over the tracks, he cannot recover for an injury there received seven minutes before his work began, and before he had reached his employer's premises. *Holmes v. Mackay* [1899] 2 Q. B. 319.

¹⁶⁰ *Walbert v. Trexler*, 156 Pa. 113; *Broderick v. Detroit U. R. S. & D. Co.*, 56 Mich. 261; *McElligott v. Randolph*, 61 Conn. 157; *Louisville & N. R. Co. v. Stuber* (C. C. A.) 108 Fed. 934.

Where a sleeping car was provided for the employes, and an injury happened after the hours of work, they were considered still employed. *International & G. N. Ry. Co. v. Ryan*, 82 Tex. 565.

Where a rule providing that cars should be loaded at the nearest switch was disregarded by the master, and the plaintiff had to go beyond that place, he continued in the employment. *Union Pacific Ry. Co. v. Jarvi* (C. C. A.) 53 Fed. 65.

¹⁶¹ *Evansville & R. R. Co. v. Maddux*, 134 Ind. 571; *Cleveland, C., C. & St. L. R. Co. v. Martin*, 13 Ind. App. 485, and cases cited; *Broderick v. Detroit U. R. S. & D. Co.*, 56 Mich. 261.

require the master to keep all places to which he may go on his own business safe for him during that time.¹⁶²

The relation does not exist when one goes to another's premises in search of work which he does not obtain;¹⁶³ but, if his employment has ended, it would seem that the rights and liabilities of the relation might continue until he had left the premises. Thus, where one was employed for a few hours on a vessel, and, having been paid off, was about going ashore, when he was injured by the negligent handling of a gangplank, the question was for the jury whether he had at the time ceased to be a servant.¹⁶⁴

While the employment continues, a servant entering or leaving the premises, although on business of his own instead of his employers, is subject to the rights and liabilities of the relation.¹⁶⁵ And if the employment has not yet been entered into or has ceased, the fact that one performs some service for the master at the request of another servant does not create the relation. "It must be to render service to some extent continuous in its nature."¹⁶⁶

There is a distinction between the fact of employ-

¹⁶² *Cleveland, C., C. & St. L. R. Co. v. Martin*, 13 Ind. App. 485; *Ellsworth v. Metheney* (C. C. A.) 104 Fed. 119. See post, § 104.

¹⁶³ *Lovell v. Charrington* (March 18, 1882) 72 Law T. 356.

¹⁶⁴ *Northwestern Packet Co. v. McCue*, 17 Wall. (U. S.) 508. A servant discharged Saturday returned on Monday to bring back tools and get pay, and was injured. Relation continued. *Cowler v. Moresby Coal Co.*, 1 Times Law R. 575.

¹⁶⁵ *Brydon v. Stewart*, 2 Macq. H. L. Cas. 30; *Whatley v. Zenida Coal Co.*, 122 Ala. 118; *Adams v. Iron Cliffs Co.*, 78 Mich. 271.

¹⁶⁶ *Georgia Pacific Railroad v. Propst*, 85 Ala. 203; *McDaniel v. Highland A. & B. R. Co.*, 90 Ala. 64.

ment and the existence of the relation of master and servant between the parties, and the scope of that employment, once it has been found that the relation exists. The subject treated in this section does not relate to the master's liability to strangers for an act of one in his general employment,¹⁶⁷ nor does it treat of the duties a servant is hired to perform or the scope of his employment as affecting the question of the master's liability to him for injuries received. This latter inquiry is more conveniently considered in subsequent chapters.¹⁶⁸

§ 14. Proximate cause.

The act applies to personal injuries suffered by a servant resulting proximately from the negligence of the master or of some one for whose negligence he is made, by the act, responsible.

Personal injuries.

The injuries for which compensation may be had under the act are those to the person of the servant,—bodily harm in life, limb, or health.¹⁶⁹

Proximate cause.

The negligence of the master, or of a servant for whose negligence he is responsible, must be the proximate cause of the plaintiff's injury. The common-law

¹⁶⁷ See *Brown v. Jarvis Engineering Co.*, 166 Mass. 75.

¹⁶⁸ *Infra*, c. 4, § 18; c. 5, § 78; c. 6, § 2; c. 7, § 2; c. 8, §§ 82, 88; c. 9, §§ 102-107.

¹⁶⁹ *Wyman v. Leavitt*, 71 Me. 227, 229; *Green v. State*, 28 Miss. 687; *State v. Clayborne*, 14 Wash. 622.

A servant may maintain an action against his master to recover for the loss of his wife's services occasioned by the negligence of his fellow servant. *Gannon v. Housatonic R. Co.*, 112 Mass. 234.

principles by which the proximate cause of an injury is discovered have not been affected by the act. No certain test or rule has been framed by which the efficient cause of an event can be picked out, but there are a few broad principles by which courts have guided juries to its determination. "Perhaps no event can occur which may be considered as insulated and independent. Every event is the effect of some cause or continuation of causes, and in its turn becomes the cause of many ensuing consequences, more or less immediate or remote. The law, however, looks to a practical rule, adapted to the rights and duties of all persons in society, in the common and ordinary concerns of actual and real life; and on account of the difficulty in unraveling a combination of causes, and of tracing each result, as a matter of fact, to its true, real, and efficient cause, the law has adopted the rule * * * of regarding the proximate, and not the remote, cause of the occurrence which is the subject of inquiry."¹⁷⁰

The phrase "proximate cause" has acquired a special meaning which is not aided by a definition. Any definition yet framed is inaccurate and requires numerous qualifications. The one most often quoted goes thus: "A proximate cause of any event must be understood to be that which in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred."¹⁷¹

¹⁷⁰ *Marble v. City of Worcester*, 4 Gray (Mass.) 395, 398; *infra*, § 54, note 160.

¹⁷¹ *Shearman & R. Neg.* § 26. "The rule, as a practical one, may be thus stated: Having discovered an efficient, adequate cause, that is to be deemed the true cause, unless some new cause, not inci-

“Proximate” does not mean nearest the result in time or space or in the order of events, but nearest in point of causal effectiveness; and “proximate cause” is, roughly, that overshadowing cause which continues working towards the result through the intervening time or space or chain of agencies and events.

In the application of the maxim, *In jure causa proxima, non remota spectatur*, a distinction has been taken between an act which is willfully done or which is itself prohibited, and one which is done negligently, without a wrong intent, and is a breach of the duty imposed on every one to use care not to injure another. In the former case the actor is presumed to intend all the consequences which resulted from his act, however remote they may be; but in the latter case the maxim is more strictly applied, and he is responsible only for the proximate result.

The consequences which naturally follow a negligent act are never remote, and although these consequences were not, and perhaps could not have been, foreseen in the form in which they occurred, yet so long as they are in the natural course of things, and follow directly in unbroken sequence from the negligent act, they are attributable to it and the proximate result of it.

The negligent actor is responsible, as well, for the probable consequences of his act, and these are such as a reasonably prudent and careful man in the same circumstances might and ought to anticipate as the probable and likely results of his act. If the actor had

dental to, but independent of, the first, shall be found to intervene between it and the result.” *Marble v. City of Worcester*, 4 Gray (Mass.) 395, 412.

knowledge, or ought to have had knowledge, of any peculiar circumstances or conditions which would be likely to increase the effects of his negligence or to bring about results not to be anticipated as the natural or probable consequences of the negligence in ordinary circumstances, he is responsible for these results.

Whether the consequences be natural or probable, or both, they are brought about, not by the negligent act alone, and independent of all else, but by the negligent act working through intervening agencies which are themselves natural and probable. The laws of nature, the conditions of climate and weather, the ordinary conduct of beasts and men, all have a share in producing the result, and in so far as these are manifested naturally, and in a manner reasonably to be expected and foreseen, they are links in the chain of causal connection between the negligence and its resulting injury. They all arise from or are incidental to the negligent act or are conditions to be considered.

Intervening cause.

When, however, between the negligent act and the injury a new cause intervenes, one that is independent of the act, springing from a source of its own, the causal connection is broken by it, and the negligent act is too remote. If this intervening agency is a new force, independent of what went before, and sufficient in itself to bring about the injury, then it is not a natural nor probable sequence of the negligent act, and although it may operate upon a state of affairs created by the negligent act, yet since it neither sprang from that condition, nor was brought into operation by that condi-

tion in a way naturally and reasonably to be anticipated, it must be regarded in itself as the proximate cause of the injury. In discovering the proximate cause, "one of the most valuable *criteria* * * * is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."¹⁷² The new force may be an innocent or guilty act of a man or the unusual manifestation of natural forces, as a flood or fire, but it must be something which breaks the natural and probable sequence, and is sufficient to count as the cause of the injury.

A distinction is to be made between the condition and the cause of the injury. A train arriving late thereby encounters a cyclone or a flood. The lateness of the train is not the cause, but a condition of affairs which gave the flood an opportunity to do the damage, and the flood is therefore the proximate cause of the injury.¹⁷³ Or where there was a defective coupling device on a train, and a brakeman, while engaged in repairing it, was injured because the engineer backed a portion of the train upon him, the proximate cause was the negligence of the engineer, and not the negligence of the company in furnishing a defective coupling.¹⁷⁴

"The true rule is that what is the proximate cause

¹⁷² *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44.

¹⁷³ *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.) 481.

¹⁷⁴ *Course v. New York, L. E. & W. R. Co.*, 2 N. Y. Supp. 312; *Pease v. Chicago & N. Ry. Co.*, 61 Wis. 163. See, on conditions, *Wharton, Negligence*, §§ 85, 86.

of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 Bl. Rep. 892. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable sequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the saw mill and piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had

been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events, an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the

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burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies; and this must be determined in view of the circumstances existing at the time."¹⁷⁵

§ 15. Concurring negligence of fellow servant.

When the negligence of a fellow servant concurs in producing an injury the master is responsible.

Concurrent causes.

In the preceding section it has been noted that a cause may become too remote by the intervention between it and the injury of a new force, unconnected with the original negligence, and sufficient of itself to bring about the injury, and that this new force must be regarded as the proximate cause. The reason is that the new force breaks the sequence of events, and is sufficient of itself to cause the injury, although it may act on a condition or state of affairs created by the negligent act. The efficacy of the original negligence in producing the injury had ceased.

But a new cause may operate in producing the injury concurrently or in conjunction with a negligent act, and if this new cause is not the sole cause of the injury, and does not break the natural and probable sequence

¹⁷⁵ Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469, 474.

of events from the negligent act, it does not render the negligent act too remote. Both of these forces may be proximate to the injury, and when they are so, and together produce it, the author of either of them is responsible for the injury, and cannot set up that another person's act or another force concurred in producing it.

It is difficult to distinguish a concurrent from an intervening cause. Both are new forces unconnected with the negligent act, and not natural or probable consequences of it; both are efficient in producing the result. But an intervening cause is solely efficient; the negligent act no longer works towards producing the result, but has become passive, and merely created a condition upon which the new force operates. A concurrent cause works with the negligent act in producing the result, and the negligence is still active and effectual. Thus, where the defendant's train on which the plaintiff was a passenger was stopped because the wheels of a hay cart were caught in the tracks, and another train owned by another company ran into the defendant's train and injured the plaintiff, and all parties save the plaintiff were negligent, it was no answer for the defendant to set up the negligence of the driver of the cart or of the other company, since, though independent causes, they combined with its negligence to produce the injury;¹⁷⁶ or where the defendant, in violation of a city ordinance, left a truck standing in the street, and a boy attempting to move it tipped a casting from it upon the plaintiff, the causes were concurrent, and the defendant liable.¹⁷⁷

¹⁷⁶ *Eaton v. Boston & L. R. Co.*, 11 Allen (Mass.) 500.

¹⁷⁷ *Lane v. Atlantic Works*, 107 Mass. 104, 111 Mass. 136. So where
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The plaintiff has the burden of showing that the defendant's act was the proximate cause of the injury, either by itself or concurrently with another act; the evidence must not leave it to conjecture.

Concurring negligence of fellow servant.

Where the master, or some one for whose carelessness he is responsible, is negligent, and the negligence of a fellow servant also combines to produce the injury, the master is answerable to the injured servant; and the fact that the concurring cause is the negligence of a fellow servant, the risk of which the plaintiff had assumed, is not a defense. This is simply an application of the rule of concurrent causes and the general principles of proximate cause. If the act of the fellow servant was natural, and should have been anticipated, the master's negligence is the proximate cause of the injury, but, if it is a new force, the question whether it is an intervening or a concurrent cause depends upon whether or not the master's negligence was active and efficient in producing the injury.

In a case where the defendant had negligently constructed a trestlework which fell, and the carelessness of plaintiff's fellow servants in the management of a train contributed to its fall, it was said: "This would not be sufficient to excuse the defendant if he was in fact responsible for the defective construction of the trestlework. It does not exonerate him from the consequences of failure in the performance of his duty, if such failure contributed to the injury, to show that, if others for

the new force is an accident which concurs with the negligence. *Palmer v. Inhabitants of Andover*, 2 Cush. (Mass.) 600.

whom he is not responsible had performed their duty, the injury would not have occurred, or that it might have been avoided by care and vigilance on the part of those who were clearly the fellow servants of the plaintiff in the transaction.”¹⁷⁸ So, where there was evidence that a staging furnished by the defendant was improperly constructed, it was no answer that it fell because it was overloaded by the fellow servants of the plaintiff,¹⁷⁹ nor is a failure of a foreman to tell the plaintiff of a rule not to use a defective elevator a defense.¹⁸⁰ Thus, if the master is negligent in any of the duties which he owes to the servant, if he furnishes defective machinery, or fails to hire competent servants, or to warn or instruct his employes, he is liable, although the negligence of a fellow servant concurred in producing the injury.¹⁸¹

In construing the highway statute permitting a recovery against a city or town for an injury suffered through any defect in a way, the Massachusetts court has held that the municipality is responsible only when

¹⁷⁸ *Elmer v. Locke*, 135 Mass. 575, 576.

¹⁷⁹ *Clark v. Soule*, 137 Mass. 380.

¹⁸⁰ *Avilla v. Nash*, 117 Mass. 318.

¹⁸¹ *Cayzer v. Taylor*, 10 Gray (Mass.) 274; *Joyce v. City of Worcester*, 140 Mass. 245; *Griffin v. Boston & A. R. Co.*, 148 Mass. 143; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Cincinnati, I., St. L. & C. Ry. Co. v. Lang*, 118 Ind. 579; *Rogers v. Leyden*, 127 Ind. 50; *Young v. New Jersey & N. Y. Ry. Co.*, 46 Fed. 160; *New Jersey & N. Y. R. Co. v. Young (C. C. A.)* 49 Fed. 723; *Clyde v. Richmond & D. R. Co.*, 59 Fed. 394; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700; *infra*, § 54, note 160.

He is not liable if the negligence of the fellow servant is an intervening and not a concurrent cause. *Carter v. Lockey Piano Case Co.*, 177 Mass. 91.

the defect is the sole cause of the injury.¹⁸² A similar construction might be placed upon the terms of the act; but as this statute does not, like the highway statute, create a new cause of action, and does not impose so high a degree of care upon the master as the municipality is bound to exercise, there is no reason for changing the general rules regarding proximate cause in cases within its application.

¹⁸² *Marble v. City of Worcester*, 4 Gray (Mass.) 395; *Rowell v. City of Lowell*, 7 Gray (Mass.) 100; *Eaton v. Boston & L. R. Co.*, 11 Allen (Mass.) 500, 505; *Billings v. City of Worcester*, 102 Mass. 329.

CHAPTER II.

PARTIES AND DAMAGES.

- § 16. Statutory Action for Death.
 - 17. Alabama.
 - 18. Massachusetts.
 - 19. Indiana.
 - 20. Colorado.
 - 21. Right of Action Ground for Administration.
 - 22. Foreign Administrator.
 - 23. Conflict of Laws.
 - 24. Releases.
 - 25. Contracts Waiving Act.
 - 26. Relief Fund Agreements.

§ 16. Statutory action for death.

The act provides for the survival of the right of action when the employe dies, and provides for the recovery of damages for his death.

When the injury suffered by the servant does not result in death, the effect of the act is to remove a defense which existed at common law, and prevented any recovery by him,¹ and in certain jurisdictions to safeguard this right of action by providing that notice of the injury be given and that the suit be commenced within a limited time.² Certain of the statutes also limit the amount of damages which he may recover. Subject to these provisions, the act has not created a

¹ Supra, § 2.

² Infra, c. 3.

cause of action unknown to the common law, or changed the processes or rules by which it is to be enforced.

Survival of action at common law.

In addition to the right of a servant to recover for injuries not resulting in death, to which the common law had interposed the bar of fellow service, the employers' liability acts give, either in terms or by reference to other statutes, a right to the personal representative of an employe to recover for loss and for suffering when the injuries resulted in death, and a right to the personal representative or to some other designated person to recover compensation for the death itself.

At the common law an action for personal injuries caused by negligence did not survive the death of the injured party,—*actio personalis moritur cum persona*; and whether the injured servant died without having begun suit, or died pending the suit, the action was abated by his decease. If a person other than the injured party were damaged by the negligent act, as by the loss of service of a wife or child or servant, he might maintain an action to recover for such damage notwithstanding the death of the injured party; but this death prevented any recovery by the personal representative for damages or compensation to the deceased occasioned by the negligent act.³ Statutes were early passed in

³ Baker v. Bolton, 1 Camp. 493; Osborn v. Gillett, L. R. 8 Exch. 88; Thayer v. Dudley, 3 Mass. 296; Carey v. Berkshire R. Co., 1 Cush. (Mass.) 475; Kearney v. Boston & W. R. Corp., 9 Cush. (Mass.) 108; Stewart v. Louisville & N. R. Co., 83 Ala. 493; James v. Richmond & D. R. Co., 92 Ala. 231; Harris v. McNamara, 97 Ala. 181; Indianapolis, P. & C. R. Co. v. Keely's Adm'r, 23 Ind. 133; Indianapolis & St. L. R. Co. v. Stout, 53 Ind. 143; Jackson v. Pittsburgh, C., C. & St. L. Ry. Co., 140 Ind. 241; Mitchell v. Colorado

most jurisdictions to remedy this state of the law, and by them it was permissible for the personal representative to begin suit, or to become a party to a suit begun by the intestate, to recover for all loss, except the death itself, occasioned by the negligence. But it was held that these statutes contemplated the survival of a right of action that had vested in the deceased, and that therefore, if the deceased were instantly killed, no right of action ever accrued to him, and it could not therefore be transmitted to his personal representative. The burden of proving life after the injury rested upon the plaintiff, and, unless this was sustained, no action for the damage could be maintained by him nor by the parent, wife, or child for any loss occasioned by the death.⁴

The employers' liability acts vary somewhat in the terms by which they permit a survival of the right of action, and will be separately considered in the subsequent sections.

Compensation for death at common law.

At the common law, "in a civil court, the death of a human being could not be complained of as an injury;"⁵ and the reason is that "there is no mode of estimating compensation for the death of a man."⁶ The common-law courts held strictly to this rule,⁷ but sev-

M. & E. Co., 12 Colo. App. 277; *Colorado M. & E. Co. v. Mitchell*, 26 Colo. 284; *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754; *Dennick v. Central R. Co.*, 103 U. S. 11.

⁴ *Kearney v. Boston & W. R. Corp.*, 9 Cush. (Mass.) 108; *Hollenbeck v. Berkshire R. Co.*, 9 Cush. (Mass.) 478. See *infra*, § 18.

⁵ *Baker v. Bolton*, 1 Camp. 493.

⁶ *Ramsdell v. New York & N. E. R. Co.*, 151 Mass. 245, 249.

⁷ *Supra*, note 3.

eral judges considered that it did not apply in admiralty, and there was much conflict in the decisions until the question was settled by the supreme court of the United States, which held that in the absence of statute no action could be maintained to recover damages for death by wrongful act occurring on the high seas or navigable waters.⁸

The earliest statute to affect this question was passed in England in 1846, and is known as "Lord Campbell's Act."⁹ This has served as the model for similar statutes which have been enacted in all jurisdictions, although they differ somewhat in detail. It provides that "whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony;" and that "every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of

⁸ The Harrisburg, 119 U. S. 199; The Alaska, 130 U. S. 201.

⁹ 9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95; Rev. Laws Mass. c. 111, § 267 (Pub. St. c. 112, § 212; Acts 1883, c. 243; Acts 1886, c. 140); Rev. Laws Mass. c. 111, § 268 (Pub. St. c. 112, § 213); Rev. Laws Mass. c. 51, § 17 (Pub. St. c. 52, § 17); Rev. Laws Mass. c. 70, § 6 (Pub. St. c. 73, § 6); Civ. Code Ala. 1896, §§ 25-27; Mills' Ann. Code Colo. § 9; Burns' Rev. St. Ind. 1901, §§ 267 (266), 285 (284).

the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties * * * as the jury by their verdict shall find and direct;" also, "that not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person."

The right of action given by these statutes depends entirely upon the terms of the enactment, and is a right unknown to the common law. Under them it is necessary that there should be persons answering the description of beneficiaries,¹⁰ and the damages are those resulting solely from the death.¹¹ Thus, under the two classes of statutes—those providing for the survival of the action and those giving compensation for death—two separate actions may be maintained for the same negligent act, but in the first case the damages are those occasioned by suffering to the deceased or by loss of his services, and in the latter the loss resulting from his death to his next of kin.¹²

¹⁰ The *George v. Richard*, 24 Law T. (N. S.) 717. Child en ventre sa mere may recover, see *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14; bastard cannot have action, *Dickinson v. North Eastern Ry. Co.*, 2 Hurl. & C. 735; husband living apart from his wife cannot, *Stimpson v. Wood*, 57 Law J. Q. B. 484.

¹¹ *Bortick v. Head*, 53 Law T. (N. S.) 909.

¹² *Bowes v. City of Boston*, 155 Mass. 344; *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143.

The employers' liability acts provide, either by reference to the statute of the jurisdiction or by their own terms, for the recovery of compensation for death caused by the negligence of the employer.

§ 17. Alabama.

Under the Alabama act, only the injured employe. or, in case of his death, his personal representative, may sue.

The damages recovered are not liable for debts, and, when the personal representative brings the action, are to be distributed according to the statute of distributions.

Death by wrongful act.

The common law in Alabama has been changed by the enactment of two statutes permitting the recovery of damages when death has been caused by the wrongful act of another. If a minor child is injured, the father, or in certain cases the mother, may bring an action for the injury,¹³ and, if the death of a minor child is caused by the wrongful act of another, the father, or in certain cases the mother, or the personal representative of

It has been held that the statutory action for death by wrongful act does not lie against the personal representatives of the wrongdoer. *Gillett v. Fairbank*, 3 Times Law R. 618; *Hegerich v. Keddie*, 99 N. Y. 258; *Hamilton v. Jones*, 125 Ind. 176; *Pennsylvania Co. v. Davis*, 4 Ind. App. 51; *Bishop v. Brown*, 14 Colo. App. 535; *Martin's Adm'r v. Baltimore & O. R. Co.*, 151 U. S. 673. See Civ. Code Ala. 1896, § 27; Pub. St. Mass. c. 165, § 1; Id. c. 166, § 1; Rev. Laws Mass. c. 171, § 1; Id. c. 172, § 1. Statutes giving remedy for death by wrongful act are constitutional. Section 4, note 52.

¹³ Code 1896, § 25 (2587). "A father, or, in case of his death or desertion of his family, or of his imprisonment for a term of two years or more, under a conviction for crime, or of his confinement in an insane asylum, or if he has been declared of unsound mind, the mother, may sue for an injury to a minor child, a member of the family."

the minor, may have an action, and recover such damages as the jury shall assess; but a suit by either the father or mother is a bar to a suit by the personal representative.¹⁴ Where the death of an adult is caused by the wrongful act of another, if the deceased could have maintained an action, his personal representative may sue and recover such damages as the jury may assess.¹⁵

Exemplary damages cannot be given when a minor is killed;¹⁶ but, if an adult is killed, exemplary damages

¹⁴ Code 1896, § 26 (2588). "When the death of a minor child is caused by the wrongful act or omission or negligence of any person or persons or corporation, his or their servants or agents, the father, or the mother, in the cases mentioned in the preceding section, or the personal representative of such minor, may sue and recover such damages as the jury may assess; but a suit by the father or mother, in such case, is a bar to a suit by the personal representative."

¹⁵ Code 1896, § 27 (2589). "A personal representative may maintain an action and recover such damages as the jury may assess for the wrongful act, omission, or negligence of any person or persons or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence if it had not caused death; such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained though there has not been prosecution or conviction or acquittal of the defendant for such wrongful act, or omission or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate."

¹⁶ *Williams v. South & N. A. R. Co.*, 91 Ala. 635; *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101. See *McGhee v. McCarley* (C. C. A.) 91 Fed. 462, 103 Fed. 55.

and something by way of *solatium* may be given in addition to the pecuniary loss.¹⁷

The distinction which these statutes have made between the death of a minor and of an adult is not preserved in the employers' liability act. The provision in that statute is: "If such injury results in the death of the servant or employe, his personal representative is entitled to maintain an action therefor."¹⁸ Under the act, therefore, only the injured employe, or, in case of his death, his personal representative, may sue.¹⁹

When the servant is a minor, the effect of the act is to give an action to his personal representative in the case of his death, and the parent of a minor has no right of action under it. The personal representative recovers damages for the death, but not for the minor's earnings,²⁰ and the parent may have an action in all cases

¹⁷ Savannah & M. R. Co. v. Shearer, 58 Ala. 672; South & N. A. R. Co. v. Sullivan, 59 Ala. 272; Richmond & D. R. Co. v. Freeman, 97 Ala. 289; Buckalew v. Tennessee C., I. & R. Co., 112 Ala. 146; Alabama G. S. R. Co. v. Burgess, 116 Ala. 509; Louisville & N. R. Co. v. Lansford (C. C. A.) 102 Fed. 62; McGhee v. McCarley (C. C. A.) 103 Fed. 55. The latter case was an action against receivers.

¹⁸ Code 1896, § 1750 (2592). "Damages recovered by the servant or employe, of and from the master or employer, are not subject to the payment of debts or any legal liabilities incurred by him."

Code 1896, § 1751 (2591). "If such injury results in the death of the servant or employe, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distributions."

¹⁹ Stewart v. Louisville & N. R. Co., 83 Ala. 493; Columbus & W. Ry. Co. v. Bradford, 86 Ala. 574; Louisville & N. R. Co. v. Trammell, 93 Ala. 350.

²⁰ Alabama C. C. & C. Co. v. Pitts, 98 Ala. 285; Tennessee C., I. & R. Co. v. Herndon, 100 Ala. 451.

where at common law he could have sued had the injury not resulted in death.²¹ "In creating this new cause of action it was, therefore, not only entirely competent for the legislature to confine it, in cases where the injury produced death, to the personal representative, but in doing so no existing right to sue was taken away from the parents. If the minor's employment was against the will of the father, he could maintain an action before the employers' act and afterwards, though not under it. If with his consent, as in this case, he could sue neither before nor after, nor under nor without the statute, if we are to give any force whatever to section 2591, which designates the only person who may sue under the act, where the injury results in death, and particularly and peremptorily makes provision for the disposition of the recovery, which can only be carried out by the personal representative."²² The employer may thus be subjected to two actions, and a judgment in one is not a bar to the other.²³

The same confusion exists between the other statutes providing for a recovery for death by wrongful act and the act when an adult is killed, since under either statute the only right of action is that given to the personal representative.

Damages for injuries.

When the injured employe himself sues, the common-

²¹ Williams v. South & N. A. R. Co., 91 Ala. 635.

²² Lovell v. De Bardelaben C. & I. Co., 90 Ala. 13, 18.

²³ Williams v. South & N. A. R. Co., 91 Ala. 635; Alabama C. C. & C. Co. v. Pitts, 98 Ala. 285; Tennessee C., I. & R. Co. v. Herndon 100 Ala. 451.

law rules as to the measure of damages apply.²⁴ "Where the injury is permanent, the plaintiff, in actions of this character, may recover compensation for the disabling effects of the injury, past and prospective. In estimating the damages, the loss of time, and the incapacity to do as profitable labor as before the injury, as well as the mental and physical suffering caused by it, are pertinent and legitimate factors."²⁵ These data must be shown in evidence by the plaintiff, that the extent of his pecuniary loss may be ascertained with reasonable certainty; else, though he has a cause of action, only nominal damages can be recovered. Damages are compensation, and must not be left to the discretion of the jury.²⁶ Exemplary damages probably cannot be recovered under the act when an employe sues, although at common law, in cases of gross neglect, they were permitted.²⁷

When a minor employe is injured and sues, the parent may have an action at common law for the loss of service; but the act does not confer a right of action upon him for the injuries, as to which the minor is the proper plaintiff.²⁸

²⁴ *Columbus & W. Ry. Co. v. Bridges*, 86 Ala. 448.

²⁵ *Mobile & O. R. Co. v. George*, 94 Ala. 199, 222; *Richmond & D. R. Co. v. Weems*, 97 Ala. 270; *Louisville & N. R. Co. v. Binion*, 107 Ala. 645.

²⁶ *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211; *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143; *Richmond & D. R. Co. v. Weems*, 97 Ala. 270; *Alabama M. R. Co. v. Jones*, 121 Ala. 113.

²⁷ *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378; *South & N. A. R. Co. v. McLendon*, 63 Ala. 266. They are not recoverable when the injury results in death. See note 29.

²⁸ *McNamara v. Logan*, 100 Ala. 187. The fellow-servant rule is applied against a father suing for loss of his son's service, though

Damages for death.

In actions by personal representatives to recover, under the act, for injuries resulting in death and for the death itself, a rule of damages has been laid down that differs somewhat from the measure adopted under the general statute providing for the recovery for death by wrongful act.

The first distinction is that exemplary or punitive damages are not to be given.²⁹ The damages are strictly compensation. Inasmuch as they are recovered for the benefit of the next of kin, to whom the personal representative must distribute them, if there are no persons answering that description substantial damages cannot be recovered. "Only the estimated, actual value of the life, based on proven data, can be recovered, with no allowance for physical pain or mental anguish suffered by the deceased, or *solatium* to the survivors on account of the bereavement. It would follow from this that to authorize the recovery of substantial damages, when the suit is by the personal representative, there must be some person or persons filling the relation of next of kin entitled to 'inherit according to the statute of distributions.' This, however, need not be averred, as the law presumes there would be surviving relations entitled to inherit. The want of them, if found to be the case, would be matter of defense."³⁰

the son, suing for his injuries, may bring himself within the act. *Woodward Iron Co. v. Cook*, 124 Ala. 349.

²⁹ *Columbus & W. Ry. Co. v. Bridges*, 86 Ala. 448; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548; *Louisville & N. R. Co. v. Trammell*, 93 Ala. 350; *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211.

³⁰ *James v. Richmond & D. R. Co.*, 92 Ala. 231, 235; *Columbus*
(100)

In determining the value of the life, the health of the employe, his habits of sobriety and industry, his family, income, and expenditures are all proper data for the consideration of the jury.³¹

Different measures of damages are applied where it appears that the next of kin of the employe were dependent upon him for support, and where it appears that he would have accumulated an estate to leave to them upon his natural death. "The measure of damages, in all cases where suit is for injuries causing the death of an employe, is the pecuniary value of the life of the employe to his next of kin, resulting either from a relation of dependency, or from expectation of benefit from the distribution of such estate as it may be inferred from the evidence he would have earned and saved but for his untimely death."³²

The evidence discloses a relation of dependency when the existence of persons dependent upon him and the amount contributed to their support is shown;³³ but "the mere fact of relationship, although it is one which apparently indicates dependency, without proof of expenditure in that direction affecting the net income,

& W. Ry. Co. v. Bradford, 86 Ala. 574; Louisville & N. R. Co. v. Orr, 91 Ala. 548. Life expectancy is a fact for jury. Decatur C. W. & M. Co. v. Mehaffey (Ala.) 29 South. 646.

³¹ Columbus & W. Ry. Co. v. Bridges, 86 Ala. 448; Columbus & W. Ry. Co. v. Bradford, 86 Ala. 574; Louisville & N. R. Co. v. Orr, 91 Ala. 548; James v. Richmond & D. R. Co., 92 Ala. 231; Richmond & D. R. Co. v. Hammond, 93 Ala. 181; McAdory v. Louisville & N. R. Co., 94 Ala. 272; Louisville & N. R. Co. v. Morgan, 114 Ala. 449; Louisville & N. R. Co. v. Jones (Ala.) 30 So. 586.

³² Louisville & N. R. Co. v. Trammell, 93 Ala. 350, 354.

³³ Alabama M. R. Co. v. Jones, 121 Ala. 113; Louisville & N. R. Co. v. Brown, 121 Ala. 221.

cannot strengthen the right to recovery or affect the measure of damages.”³⁴ The rule of damages when only a relation of dependency appears “manifestly is that which gives such sum as, being put to interest, will each year, by taking a part of the principal and adding it to the interest, yield \$150 (this being the amount which the court ascertained was annually expended in the support of the wife), and so that the whole remaining principal at the end of the twenty-seventh year (the probable duration of the employe’s life), added to the interest on this balance for that year, will equal \$150.”³⁵

But when the evidence discloses a surplus income, the rule has been thus stated: “As the statute provides that the damages recovered shall be distributed according to the statutes of distribution, they should be calculated in reference to the reasonable expectation of benefit from the continuance of the life. That benefit is the estate of the person killed, had he survived, consisting of the accumulations by his labor or skill at the termination of expectancy of life, not including any income derived from property or investments or employment of capital. In computing the pecuniary loss, the first item, or unknown quantity to be ascertained, is the aggregate amount of the net earnings at the end of the expected term of life, estimated on the basis of his health, ability to labor, habits of sobriety, industry, and economy, gross annual earnings and expenditures. The sum of such accumulations, however, is not the measure

³⁴ *Bromley v. Birmingham M. R. Co.*, 95 Ala. 397, 406.

³⁵ *Louisville & N. R. Co. v. Trammell*, 93 Ala. 350, 354; *Louisville & N. R. Co. v. Markee*, 103 Ala. 160; *Alabama G. S. R. Co. v. Hall*, 105 Ala. 599.

of the pecuniary value of the life at the time death resulted from the injury, but merely constitutes the benefit which his distributees would have received at the expiration of the period of probable duration, had he remained living till then. The object of inquiry is the value, at the time of death, of the probable future accumulations, had the person not been killed. The rule that the aggregate amount of the net earnings is the measure of recovery gives, presently, to the next of kin, the entire benefit which they would not have been entitled to, and would not have received, until the expiration of the expected term of life. In this case, the probable duration of life being about forty years, this rule would enable the distributees to realize the entire fruits of the accumulating capacity forty years before they would or could have realized them had he lived,—giving the accruing interest on the damages recovered during the whole period of the probable duration of life, in excess of the actual pecuniary loss suffered by them. Considering that the pecuniary value of the life is to be calculated in reference to the reasonable expectation of advantage from its continuation, and that, had it continued for the period of probable duration, the distributees would not have received any benefit from its continuance until the termination of that period, a rule fixing the measure of damages at such sum as, with legal interest during the period of the expectancy of life, would produce at its expiration a sum equal to the net earnings during the same period, seems to be founded on reason and principle, and just to all parties.”³⁶

³⁶ *McAdory v. Louisville & N. R. Co.*, 94 Ala. 272, 275; *Louisville & N. R. Co. v. Morgan*, 114 Ala. 449. The probability that a minor

The damages, when recovered, are not subject to the debts or liabilities of the injured employe, or, in case of his death, of his estate.³⁷

The persons to whom the damages for the death are to be distributed are such as would take under the statute of distributions in force at the time when the claim for damages accrued.³⁸

§ 18. Massachusetts.

The Massachusetts act permits the injured employe to sue, and limits his damages to \$4,000.

If the employe is instantly killed, or dies without conscious suffering, the widow or the dependent next of kin may sue and recover not less than \$500 nor more than \$5,000 damages, to be assessed with reference to the degree of culpability.

If the employe is not instantly killed, or his death is preceded by a period of conscious suffering, his personal representative may sue and recover in damages for both the suffering and the death a sum not exceeding \$5,000, to be apportioned between the personal representative and the widow or dependent next of kin.

Death by wrongful act.

The common-law rule that an action for personal injuries dies with the person was early changed by a statute which provided that, if an action had vested in the deceased, it should survive to his personal representa-

will marry and have a family who might survive to inherit his estate is too remote and conjectural to consider. *Tennessee C., I. & R. Co. v. Herndon*, 100 Ala. 451; *Nave v. Alabama G. S. R. Co.*, 96 Ala. 264. See, also, *Tutwiler Coal, etc., Co. v. Enslen* (Ala.) 39 So. 600.

³⁷ *Griswold v. Griswold*, 111 Ala. 572.

³⁸ *Griswold v. Griswold*, 111 Ala. 572.

ative.³⁹ To permit an action by the personal representative under this statute, it must appear that the deceased was not instantly killed, but lived long enough to enable a right of action to vest in him which he could transmit to his representatives.⁴⁰ The question was whether the deceased lived after the injury, and whether he suffered consciously or not was immaterial. The damages recovered were not for the death, but for the suffering preceding it, and consequently, to recover more than nominal damages, it was incumbent upon the plaintiff to produce evidence of suffering.⁴¹ This statute is one of general application, and permits merely a survival of the right of action.

Massachusetts has only recently passed a statute of general application permitting the recovery of damages for death by wrongful act.⁴² But by a series of special statutes, this remedy had been given where death resulted from a defect in a highway,⁴³ or through the negligence of a common carrier,⁴⁴ where a passenger or stranger was injured by a street or steam railroad,⁴⁵ or where an employe of a railroad had been killed.⁴⁶ These statutes in general permit a recovery by the personal

³⁹ Pub. St. c. 165, § 1; Rev. Laws Mass. c. 171, § 1.

⁴⁰ *Kearney v. Boston & W. R. Corp.*, 9 Cush. (Mass.) 168; *Hollenbeck v. Berkshire R. Co.*, 9 Cush. (Mass.) 478.

⁴¹ *Bancroft v. Boston & W. R. Corp.*, 11 Allen (Mass.) 34; *Tully v. Fitchburg R. Co.*, 134 Mass. 499; *Mulchahey v. Washburn Car Wheel Co.*, 145 Mass. 281.

⁴² Acts 1898, c. 565; Rev. Laws Mass. c. 171, § 2.

⁴³ Pub. St. c. 52, § 17; Rev. Laws Mass. c. 51, § 17.

⁴⁴ Pub. St. c. 73, § 6; Rev. Laws Mass. c. 70, § 6.

⁴⁵ Pub. St. c. 112, §§ 212, 213; Acts 1886, c. 140; Rev. Laws Mass. c. 111, §§ 267, 268.

⁴⁶ Acts 1883, c. 243; Rev. Laws Mass. c. 111, § 267.

representative either by indictment or by action, and the penalty or damages are received by the personal representative to the use of the widow and children in equal shares, or, if there is no widow, then to the next of kin. The damages are not to exceed \$5,000, nor to be less than \$500, and some of the statutes provide that they are to be assessed with reference to the degree of culpability. Whether the damages are recovered by action or by indictment, they are "in substance a penalty given to the widow and children and next of kin, instead of to the commonwealth," and are not regarded as compensation.⁴⁷ This treatment of negligence causing death as a crime has led courts in other jurisdictions, in several instances, to refuse to enforce rights acquired under these enactments.⁴⁸ In a proceeding under these statutes, it must appear that the administrator was appointed in Massachusetts,⁴⁹ and, unless there be a widow or next of kin, the suit cannot be maintained.⁵⁰ The damages, when recovered, are not a part of the estate of the deceased, nor assets for the payment of debts.⁵¹

These statutes contain no provision for the recovery

⁴⁷ *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 71; *Ramsdell v. New York & N. E. R. Co.*, 151 Mass. 245; *Sackett v. Ruder*, 152 Mass. 397, 404; *Consolidated H. M. L. M. Co. v. Bradley*, 171 Mass. 127; *Mulhall v. Fallon*, 176 Mass. 266, 269.

⁴⁸ *Supra*, § 7, note 84.

⁴⁹ *Com. v. Sanford*, 12 Gray (Mass.) 174; *Com. v. East Boston Ferry Co.*, 13 Allen (Mass.) 589.

⁵⁰ *Com. v. Boston & W. R. Corp.*, 11 Cush. (Mass.) 512; *Com. v. Eastern R. Co.*, 5 Gray (Mass.) 473; *Com. v. Boston & A. R. Co.*, 121 Mass. 36; *Hicks v. New York, N. H. & H. R. Co.*, 164 Mass. 424, 429.

⁵¹ *Com. v. Metropolitan R. Co.*, 107 Mass. 236; *Higgins v. Central N. E. & W. R. Co.*, 155 Mass. 176, 181.

of damages by the personal representative for the suffering of the deceased, but only for the death itself. It is immaterial, on the question of compensation for the death, whether the death was instantaneous, or preceded by suffering. If it was not instantaneous, then there may be two actions by the personal representative,—one to recover, on a cause of action which had vested in the deceased, damages for his suffering, and the other to recover for the death.⁵²

The employers' liability act.

The Massachusetts legislature has followed the same theory in framing the act which it had adopted in the line of previous statutes. It regards the death as a substantive cause of action, and affixes a penalty rather than damages to the fault. The act⁵³ differs, however,

⁵² *Bowes v. City of Boston*, 155 Mass. 344.

⁵³ The subject is now governed by Rev. Laws Mass. c. 106, providing:

"Sec. 72. If the injury described in the preceding section results in the death of the employe, and such death is not instantaneous, or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal representatives of said employe may, in the action brought under the provisions of the preceding section, recover damages for the death, in addition to those for the injury.

"Sec. 73. If, as a result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of section seventy-one, an employe is instantly killed, or dies without conscious suffering, his widow, or, if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer.

"Sec. 74. If, under the provisions of either of the two preceding

from the preceding statutes, in that it is the first to give a personal representative a right to recover in one action damages for both the suffering and the death; and

sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer, or of the person for whose negligence the employer is liable. The amount of damages which may be awarded in an action under the provisions of section seventy-one for a personal injury to an employe, in which no damages for his death are awarded under the provisions of section seventy-two, shall not exceed four thousand dollars. The amount of damages which may be awarded in such action, if damages for his death are awarded under the provisions of section seventy-two, shall not exceed five thousand dollars for both the injury and the death, and shall be apportioned by the jury between the legal representatives of the employe and the persons who would have been entitled, under the provisions of section seventy-three, to bring an action for his death if it had been instantaneous or without conscious suffering. The amount of damages which may be awarded in an action brought under the provisions of section seventy-three shall not be less than five hundred, nor more than five thousand, dollars.

The original act of 1887 (chapter 270, §§ 1-3) was amended by the following statutes in regard to damages:

St. 1892, c. 260, § 1: "The employe, or, in case the injury results in death, the legal representatives of such employe, shall have the same right of compensation and remedies against the employer as if the employe had not been an employe of, nor in the service of, the employer nor engaged in its work. And in case such death is not instantaneous, or is preceded by conscious suffering, said legal representatives may, in the action brought under this section, except as hereinafter provided, also recover damages for such death. The total damages awarded hereunder, both for said death and said injury, shall not exceed five thousand dollars, and shall be apportioned by the jury between the legal representatives and the persons, if any, entitled, under the succeeding section of this act, to bring an action for instantaneous death. If there are no such persons, then no damages for such death shall be recovered, and the damages, so far as the same are awarded for said death, shall be assessed with reference to the degree of culpability of the em-

although it treats these as distinct items of damage, it does not cast upon him the burden of bringing separate actions for the recovery of them. Thus it requires the jury to apportion the damages for the suffering and for the death between the personal representative and the widow or dependent next of kin;⁵⁴ and if there are no widow or dependent next of kin, damages for the death cannot be recovered by him. The act has also introduced the distinction of death without conscious suffering, and that the next of kin, in order to recover, must have been dependent upon the deceased for support.

ployer herein, or the person for whose negligence he is made liable."

St. 1887, c. 270, § 2: "Where an employe is instantly killed, or dies without conscious suffering, as the result of the negligence of an employer, or of the negligence of any person for whose negligence the employer is liable under the provisions of this act, the widow of the deceased, or, in case there is no widow, the next of kin, provided that such next of kin were, at the time of the death of such employe, dependent upon the wages of such employe for support, may maintain an action for damages therefor, and may recover in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered."

St. 1892, c. 260, § 2: "Except in actions brought by the personal representatives under section one of this act to recover damages for both the injury and death of an employe, the amount of compensation receivable under this act in cases of personal injury shall not exceed the sum of four thousand dollars. In case of death which follows instantaneously or without conscious suffering, compensation in lieu thereof may be recovered in not less than five hundred, and not more than five thousand, dollars, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable."

⁵⁴ Ramsdell v. New York & N. E. R. Co., 151 Mass. 245; Gustafsen v. Washburn & M. Mfg. Co., 153 Mass. 468; Clark v. New York. P. & B. R. Co., 160 Mass. 39.

The effect of the second section of the act has been to give a new cause of action against an employer whose personal negligence causes the death of an employe. It gives "a right of recovery whenever a person is instantly killed, or dies without conscious suffering, as the result of any negligence of the employer himself, but does not give the right when the death occurs from the negligence of an employe, unless the negligence is of a kind that would subject the employer to a liability under the first section of the statute if the deceased person had been injured and survived."⁵⁵ Under this section, the widow, or, if no widow, then such of the dependent next of kin as were at the time of the injury dependent upon the deceased for support, is the proper party to bring the action.

There are only two sections "which give anybody a right to sue,"⁵⁶ and the proper persons to sue, and the limit of damages which may be recovered, may be stated as follows:

(1) The injured employe may himself sue and recover a sum not exceeding \$4,000. His right of action survives to his personal representatives.⁵⁷

(2) If the employe is not instantly killed, or his death is preceded by a period of conscious suffering, his personal representative must bring the action, and may re-

⁵⁵ *Welch v. Grace*, 167 Mass. 590, 592; *Ramsdell v. New York & N. E. R. Co.*, 151 Mass. 245, 249; *Vetaloro v. Perkins*, 101 Fed. 393.

⁵⁶ *Ramsdell v. New York & N. E. R. Co.*, 151 Mass. 245, 249.

⁵⁷ In this action, the act has made no change in the common law or the practice relative to the plaintiff, or the rule of damages, beyond establishing a limit.

cover both for the suffering and for the death a sum not exceeding \$5,000. These are distinct items of damage, although recovered in one action, and the jury is to apportion the amount of the verdict between the personal representative and the widow, or, if no widow, the dependent next of kin. The damages recovered for the death belong to the widow or to the dependent next of kin, and are to be assessed with reference to the degree of culpability, and none may be recovered unless there is a widow or dependent next of kin.⁵⁸ Damages recovered for the suffering go to the personal representative, and, if none may be recovered for the death, they cannot exceed \$4,000.⁵⁹

(3) When the employe is instantly killed, or dies without conscious suffering, the widow, or, if no widow, then such of the next of kin⁶⁰ as at the time of the injury were dependent upon the wages of the deceased for support, are the proper parties plaintiff, and may recover damages not more than \$5,000, nor less than \$500, to be assessed with reference to the degree of culpability.

(4) When the employe is instantly killed, or dies without conscious suffering, through the personal neg-

⁵⁸ Before the amendment of 1892 (chapter 260), damages for death could not be recovered by the personal representative. *Ramsdell v. New York & N. E. R. Co.*, 151 Mass. 245. It should appear that such persons as widow or dependent next of kin exist. See note 49, § 18.

⁵⁹ There was doubt whether the limit in such case, under the earlier statutes, was not \$5,000, but by Rev. Laws Mass. c. 106, § 74, the limit is made \$4,000.

⁶⁰ Not all the next of kin, but only such as are dependent, are proper parties. *Daly v. New Jersey S. & I. Co.*, 155 Mass. 1.

ligence of the employer, the widow or dependent next of kin may sue and recover a sum to be assessed with reference to the degree of culpability, and not more than \$5,000, nor less than \$500. This action will not lie if the negligence of any servant, save such a one as is named in one of the clauses of the act, caused the injury.⁶¹

Such damages as are recovered for the death are not assets for the payment of debts, whether recovered by the personal representative or by the dependent next of kin.⁶²

Conscious suffering.

Whether the person to sue is the personal representative or the widow depends upon whether or not the deceased consciously suffered. If he was not instantly killed, or died after conscious suffering, the personal representative must bring the action; but the widow or dependent next of kin is the proper plaintiff when the employe was instantly killed, or died without conscious suffering. "Whether a person injured endured suffering has sometimes depended upon the question whether his death was instantaneous, but the two inquiries are distinct;" and so, where the question was whether a cause of action accrued to the intestate in his lifetime, the court properly ruled that, where he was found ten minutes after the accident, breathing, but unconscious, the action could be maintained, but as there

⁶¹ Supra, note 55.

⁶² *Com. v. Metropolitan R. Co.*, 107 Mass. 236; *Higgins v. Central N. E. & W. R. Co.*, 155 Mass. 176, 181.

was no evidence to warrant a finding that he endured any conscious pain or suffering, only nominal damages could be awarded.⁶³

The question of conscious suffering is ordinarily for the jury. Evidence that the deceased uttered a few scattered words,⁶⁴ or took a few steps,⁶⁵ do not necessarily imply voluntary action or consciousness on his part. And so where one, after a violent explosion, was found alive and groaning, and a physician testified that the force of the explosion made him unconscious, there was evidence for the jury that he died without conscious suffering.⁶⁶ Where a person said several sentences, it is a question for the jury whether the death was preceded by conscious suffering.⁶⁷ "We do not see how, without resorting to what would seem to partake of metaphysical nicety, the second in which the deceased was killed can be separated from the second in which he fell and the seconds which intervened between that and the death, so as to say his death was without conscious suffering." Thus, where a brakeman was thrown from a slowly-moving train, and dragged two hundred feet, dur-

⁶³ *Mulchahey v. Washburn Car Wheel Co.*, 145 Mass. 281.

⁶⁴ *Willey v. Boston Electric Light Co.*, 168 Mass. 40.

⁶⁵ *Mears v. Boston & M. R. R.*, 163 Mass. 150.

⁶⁶ *Green v. Smith*, 169 Mass. 485; *Maher v. Boston & A. R. Co.*, 158 Mass. 36.

⁶⁷ *Knight v. Overman Wheel Co.*, 174 Mass. 455. Evidence of conscious suffering when one is suffocated, *Nourse v. Packard*, 138 Mass. 307; *Pierce v. Cunard S. S. Co.*, 153 Mass. 87; *Finnegan v. Fall River Gas Works Co.*, 159 Mass. 311. For evidence in other cases, see *Kearney v. Boston & W. R. Corp.*, 9 Cush. (Mass.) 108; *Bancroft v. Boston & W. R. Corp.*, 11 Allen (Mass.) 34; *Corcoran v. Boston & A. R. Co.*, 133 Mass. 507; *Tully v. Fitchburg R. Co.*, 134 Mass. 499; *Riley v. Connecticut River R. Co.*, 135 Mass. 292.

ing which time he received but slight injuries, and then he was killed by being drawn under the cars, it was held that his death was preceded by a period of conscious suffering, and consequently his next of kin could not maintain an action under the act.⁶⁸ In this case, the question was as to the proper party to bring the action, and not upon the question of damages for the conscious suffering. In a suit to recover such damages where the intestate fell from a staging to the ground, and became unconscious, the court said: "It may be true, as an abstract proposition of law, that if a man is precipitated from a height by the negligence of another, and is injured, he may recover, as one element of his damages, for any mental suffering he may prove he endured during his fall. * * * The plaintiff was entitled to recover only such damages as she proved were sustained by her intestate. The burden of proof was upon her to show that the intestate endured mental suffering during the fall, before the jury could allow any damages on that account. But the evidence in the case showed that the intestate became unconscious upon striking the ground. The fall occupied but an instant of time. He could not furnish and did not furnish any proof as to his mental condition during the fall. Whether he suffered any mental terror or distress is purely a matter of conjecture. The plaintiff, therefore, could recover nothing on this account. But the instruction given naturally led the jury to suppose that they might give the plaintiff substantial damages for the mental suffering of the intestate during the fall."⁶⁹ The plaintiff is bound

⁶⁸ *Martin v. Boston & M. R. R.*, 175 Mass. 502, 504.

⁶⁹ *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90, 92.

to introduce evidence on the question of conscious suffering, and it must not be left to conjecture.⁷⁰

Dependency.

When the death is instantaneous, or without conscious suffering, the next of kin may sue, provided that there is no widow, and provided that they were at the time of the injury dependent upon the wages of the deceased for support. The plaintiff must show that he was actually dependent. "Trivial or causal, or perhaps wholly charitable, assistance, would not create a relation of dependency. * * * Something more is undoubtedly required. The beneficiary must be dependent upon the member in a material degree for support or maintenance or assistance, and the obligation on the part of the member to furnish it must, it would seem, rest upon some moral or legal or equitable grounds, and not upon the purely voluntary or charitable impulses or disposition of the member."⁷¹ There need be no obligation on the part of the deceased to support the next of kin, if in fact he does actually contribute to their support, so that it may be said they are dependent upon him. The test is actual dependence, not "legal dependence," and this is a question for the jury, and not the court.⁷² Partial dependence is enough. Thus, when the plaintiff is able to earn something, but not enough for her support, and relies upon the assistance

⁷⁰ *Hodnett v. Boston & A. R. Co.*, 156 Mass. 86.

⁷¹ *McCarthy v. Supreme Lodge, N. E. O. P.*, 153 Mass. 314, 318; *Supreme Council, A. L. H., v. Perry*, 140 Mass. 580.

⁷² *Daly v. New Jersey S. & I. Co.*, 155 Mass. 1.

of the deceased, she is dependent, within the act.⁷³ Thus, a mother or sister who receives all the money earned by members of the family, and uses it to pay the expenses of the family, may be held dependent upon one of the members who is killed, although it does not appear to what extent she was dependent on him.⁷⁴ But evidence that deceased used to see the plaintiff, and sometimes gave her money, that he sent her money every other week or so to pay the rent, and that she had no means of support but her earnings, and since his death had had to support herself, is insufficient, since there was nothing to show what her earnings or her expenses of living were, or that she was in fact dependent upon his wages for support.⁷⁵

Only such of the next of kin as are dependent may sue, and the others are not parties.⁷⁶

Damages.

Subject to the limitation upon the amount, damages are to be measured in accordance with the common-law rules. But when they are given for the death, since they are a penalty rather than compensation, the measure is the degree of culpability of the defendant. The statute also provides that, if the employer has contributed to any relief fund, he may prove in mitigation of

⁷³ *Daly v. New Jersey S. & I. Co.*, 155 Mass. 1; *Mulhall v. Fallon*, 176 Mass. 266.

⁷⁴ *Houlihan v. Connecticut River R. Co.*, 164 Mass. 555; *Welch v. New York, N. H. & H. R. Co.*, 176 Mass. 393. See *Main Colliery Co. v. Davies* [1900] App. Cas. 358.

⁷⁵ *Hodnett v. Boston & A. R. Co.*, 156 Mass. 86.

⁷⁶ *Daly v. New Jersey S. & I. Co.*, 155 Mass. 1.

damages such proportion of the benefit received by the plaintiff from the fund on account of the contribution of the employer as the contribution of the employer bears to the whole contribution to the fund.⁷⁷

§ 19. Indiana.

The Indiana act provides that the damages shall be commensurate with the injury; and, if death results, the action survives, and is governed by the laws in force as to such actions. If the employe killed is a minor, his parent is the proper plaintiff, but if there is no parent, or if the child has been emancipated, his personal representative may sue.

If the employe killed is not a minor, his personal representative sues for the exclusive benefit of the widow or children or the next of kin.

The employers' liability act of Indiana provides that "the damages recoverable under this act shall be commensurate with the injury sustained, unless death results from such injury, when in such case the action shall survive and be governed in all respects by the law now in force as to such actions: provided, that where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and pending such appeal the injured person dies, and the judgment rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representatives."⁷⁸

This act is limited in its application to corporations exclusive of municipal corporations. When an employe

⁷⁷ Acts 1887, c. 270, § 6; Rev. Laws Mass. c. 106, § 78. As to refusal to submit to examination by a certain doctor, see *Stack v. New York, N. H. & H. R. Co.*, 177 Mass. 155.

⁷⁸ Burns' Rev. St. Ind. 1901, § 7085.

has a cause of action under it, his personal representative may prosecute it. The right exists only by statute, "not for the benefit of intestate's estate, but as a source of compensation to those who by the death become the parties injured by the wrongful act of the defendant."⁷⁹

The common-law rule that damages for the death of a person were not recoverable had previously been changed by statute in Indiana, and to these general laws and the decisions under them the employers' act refers.

For the death or injury of a child, the father, or, under certain circumstances, the mother, is given a right of action, and for the death or injury of a ward his guardian is the proper person to sue. In the latter case the damages inure to the benefit of the ward's estate.⁸⁰

By another statute it is provided that, where the death of a person is caused by the wrongful act of another, his personal representatives may sue. The action must be brought within two years, and the damages recovered inure to the exclusive benefit of the widow and children, if any, or to the next of kin, to be distributed in the same manner as personal property of the deceased.⁸¹

⁷⁹ *Pittsburgh, C., C. & St. L. Ry. Co. v. Moore*, 152 Ind. 345; *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230.

⁸⁰ "A father (or, in case of his death or desertion of his family, or imprisonment, the mother) may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward; but when the action is brought by the guardian for an injury to his ward, the damages shall inure to the benefit of his ward." *Burns' Rev. St. Ind.* 1901, § 267.

⁸¹ "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he * * * lived, against (118)

These two statutes are distinct enactments. "Section 284 (Revision of 1894, § 285) * * * is entirely disconnected from section 266 (Revision of 1894, § 267), and exerts no sort of influence upon the construction of or right conferred under the latter section."⁸² Several earlier cases, overruled by the decisions just noted, had considered that the parent sued in a representative capacity, and that the amount of recovery and the distribution of damages were governed by section 284,—the general statute as to death.⁸³ It is now settled, however, that, where the relation of parent and child exists, the father or mother, or the guardian if there be one, must sue, and both common-law damages for loss of service and damages under the statute for the death are recovered in the parent's own right.⁸⁴ "Child" in the statute is not synonymous with "minor," and although the

the latter for an injury for the same act or omission. The action shall be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow or widower, as the case may be, and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Burns' Rev. St. Ind. 1901, § 285.

⁸² Louisville, N. A. & C. Ry. Co. v. Goodykoontz, 119 Ind. 111; Mayhew v. Burns, 103 Ind. 328; Ft. Wayne, C. & L. Ry. Co. v. Beyerle, 110 Ind. 100. As to the person to sue under the coal mines act, see Boyd v. Brazil Block Coal Co., 25 Ind. App. 157; Elliott v. Brazil Block Coal Co., 25 Ind. App. 592; Maule Coal Co. v. Partenheimer, 155 Ind. 100.

⁸³ Pittsburgh, Ft. W. & C. Ry. Co. v. Vining's Adm'r, 27 Ind. 513; Cincinnati, H. & D. R. Co. v. Chester, 57 Ind. 297; Gann v. Worman, 69 Ind. 458.

⁸⁴ Mayhew v. Burns, 103 Ind. 328.

Mother suing must allege facts showing that father could not sue. Louisville, E. & St. L. C. R. Co. v. Lohges, 6 Ind. App. 288.

child is over age, yet the parent is the proper party plaintiff.⁸⁵ "Child" also means legitimate and legally adopted children.⁸⁶ If there is no parent or guardian, or if, although the parents are living, the relation of parent and child has ceased, and the child has been emancipated, the personal representative may sue.⁸⁷

When the action is brought by the personal representative, it must be alleged and proved that there are in existence widow and children or next of kin,⁸⁸ and that they have suffered actual loss; but, if the beneficiaries are the widow or children, actual loss need not be alleged, since it will be presumed that they have sustained it.⁸⁹

Damages.

The limit of damages in an action by a personal rep-

⁸⁵ Louisville, N. A. & C. Ry. Co. v. Wright, 134 Ind. 509.

⁸⁶ Thornburg v. American Strawboard Co., 141 Ind. 443; McDonald v. Pittsburgh, C., C. & St. L. Ry. Co., 144 Ind. 459; Citizens' Street R. Co. v. Willooby, 15 Ind. App. 312; Citizens' Street Ry. Co. v. Cooper, 22 Ind. App. 459.

⁸⁷ Mayhew v. Burns, 103 Ind. 328; Berry v. Louisville, E. & St. L. R. Co., 128 Ind. 484; Elwod E. S. Ry. Co. v. Ross (Ind. App.) 58 N. E. 535.

⁸⁸ State v. Walford, 11 Ind. App. 392; Wabash R. Co. v. Cregan, 23 Ind. App. 1; Mayhew v. Burns, 103 Ind. 328. If complaint is otherwise good, it is immaterial that some are described as next of kin who are not such. Clore v. McIntire, 120 Ind. 262. The complaint must also show that intestate was in the exercise of due care. Evansville & C. R. Co. v. Lowdermilk, 15 Ind. 120; Cincinnati & M. R. Co. v. Eaton, 53 Ind. 307. And that it was not caused by fellow servant's fault. Madison & I. R. Co. v. Bacon, 6 Ind. 205; Sullivan v. Toledo, W. & W. Ry. Co., 58 Ind. 26.

⁸⁹ Louisville, N. A. & C. Ry. Co. v. Buck, 116 Ind. 566; Korraday v. Lake Shore & M. S. Ry. Co., 131 Ind. 261; Chicago & E. R. Co. v. Thomas (Ind.) 55 N. E. 861.

representative for the benefit of the widow and children or the next of kin is \$10,000, and these are to be distributed as personal property of the deceased.

If the beneficiaries are the widow or children, substantial damages may be given, although no evidence of actual loss is offered. As the deceased was under a legal obligation to support them, it will be presumed that loss was sustained, and the jury, in their discretion, may give damages for this loss of support and maintenance in addition to any loss there may be through anticipated benefit from his accumulation of property.⁹⁰

If, however, the beneficiaries are the next of kin, "the question is solely one of pecuniary loss. Damages for the bereavement, for pain, or by way of *solatium* are not recoverable. It being true that the damages in cases like this are limited to the pecuniary loss sustained by the next of kin of the deceased, and there being no legal obligation resting upon the deceased to contribute to such next of kin, damages will not be presumed, but must be affirmatively proved."⁹¹ This rule of damages applies to a parent suing for the death of an adult child, or to a guardian suing for the death of his ward.⁹²

The measure of damages for the death of a minor

⁹⁰ *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168; *Diebold v. Sharp*, 19 Ind. App. 474; cases *supra*, note 88. Elements of damages, *City of Delphi v. Lowery*, 74 Ind. 520; *Ohio & M. Ry. Co. v. Dickerson*, 59 Ind. 317; *Mayhew v. Burns*, 103 Ind. 328; *Indianapolis, P. & C. Ry. Co. v. Pitzer*, 109 Ind. 179; *Ohio & M. Ry. Co. v. Voight*, 122 Ind. 288; *Wright v. City of Crawfordsville*, 142 Ind. 636; *Hunt v. Conner* (Ind. App.) 59 N. E. 50. Need not aver damages sustained, *Chicago & E. R. Co. v. Thomas*, 155 Ind. 634.

⁹¹ *Commercial Club v. Hilliker*, 20 Ind. App. 239, 243; *Chicago & E. R. Co. v. Branyan*, 10 Ind. App. 570; *Diebold v. Sharp*, 19 Ind.

child "is the value of the child's services from the time of injury until he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance. To this may be added, in proper cases, the expenses of care and attention to the child, made necessary by the injury, funeral expenses, and medical services."⁹³

By making damages in cases of injury not followed by death commensurate with the injury, the act forbids exemplary damages, and they are not permitted in cases of death where the rule of damages is compensation for pecuniary loss.

§ 20. Colorado.

Under the Colorado act, when death results from the injury, the persons to sue are those designated by the general laws. These persons are the husband or wife of the deceased, or, if there is neither husband nor wife, then the heirs of the deceased, and, if the deceased be a minor or unmarried, then the father or mother.

The damages for personal injury resulting from the negligence of a co-employee, or for the death, are limited to \$5,000.

The act provides that "the employe, or, in case the injury results in death, the parties entitled by law to sue and recover for such damages, shall have the same

App. 474; *Mayhew v. Burns*, 103 Ind. 328; *Wabash R. Co. v. Cregan*, 23 Ind. App. 1.

⁹² *Louisville, N. A. & C. Ry. Co. v. Goodykoontz*, 119 Ind. 111; *Louisville, N. A. & C. Ry. Co. v. Wright*, 134 Ind. 509.

⁹³ *Pennsylvania Co. v. Lilly*, 73 Ind. 252, 254; *Mayhew v. Burns*, 103 Ind. 328; *Louisville, N. A. & C. Ry. Co. v. Goodykoontz*, 119 Ind. 111; *Jackson v. Pittsburgh, C., C. & St. L. Ry. Co.*, 140 Ind. 241; *City of Elwood v. Addison* (Ind. App.) 59 N. E. 47.

right of compensation and remedy against the employer as if the employe had not been an employe of or in the service of the employer, or engaged in his or its works."⁹⁴

Under the general laws it is provided that "whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employe, whilst running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or other public conveyance whilst in the charge of the same as a driver, * * * the corporation, individual, or individuals in whose employ any such officer, agent, servant, employe, master, pilot, engineer, or driver shall be at the time any such injury is committed, or who owns any such railroad locomotive, car, stage coach, or other public conveyance at the time any such injury is received, and resulting from or occasioned by defect or insufficiency above described, shall forfeit and pay for every person * * * so injured the sum of not exceeding five thousand dollars and not less than three thousand dollars, which may be sued for and recovered: First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased; or, third, if such deceased be a minor or unmarried, then by the father or mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. * * *"

The succeeding section provides: "Whenever the

⁹⁴ Sess. Laws Colo. 1893, c. 77, § 1; Mills' Ann. St. 1891-96, § 1511a.

death of a person shall be caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the party injured." "All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in the first section of this act, and in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand dollars, with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default." The action must be begun within two years from the death.⁹⁵

It was held that the act did not permit a personal representative of a deceased employe to recover under its provisions on the ground that the title of the act concerned "damages" sustained by an agent, servant, or

⁹⁵ Mills' Ann. St. c. 37, §§ 1508-1511. A father, or, in case of his death or desertion, the mother, may have an action for the death of a child, and a guardian for the death of his ward. Mills' Ann. Code, § 9. The parents of an unmarried adult may sue. *Denver, S. P. & P. R. Co. v. Wilson*, 12 Colo. 26. The husband or wife may sue at any time during the two years if the heirs have failed to take action. *Hayes v. Williams*, 17 Colo. 465. As to the purpose of these statutes, see *Atchison, T. & S. F. R. Co. v. Farrow*, 6 Colo. 498.

employe, and as the personal representative was not damnified he did not have a right of action. This decision was, however, reversed, and "damages" construed to mean "injuries," and consequently there may be a recovery for death by the party entitled under the general laws to sue.⁹⁶

Damages.

Where an employe himself sues under the act, it is provided that the amount of compensation, in case of personal injury resulting solely from the negligence of a co-employe, shall not exceed the sum of \$5,000.⁹⁷ This clause refers to compensation for personal injuries, and not for death, and it is limited to those cases where the negligence is that of a co-employe named in one of the sections of the act. Where, however, the employer or his vice principal is personally negligent and causes the injury, the damages are unlimited.⁹⁸

When compensation is sought by a person entitled to sue for the death, the limit of damages is \$5,000, and the measure is such damages as the jury may deem fair and just with reference to the necessary injury resulting from such death. The statute is not penal, and contemplates a recovery measured by the pecuniary loss sustained.⁹⁹

"The true measure of compensatory relief in actions

⁹⁶ Mitchell v. Colorado, M. & E. Co., 12 Colo. App. 277; Colorado, M. & E. Co. v. Mitchell, 26 Colo. 284.

⁹⁷ Sess. Laws Colo. 1893, c. 77, § 2; Mills' Ann. St. 1891-96, § 1511b.

⁹⁸ Supra, § 2, note 26.

⁹⁹ Moffatt v. Tenney, 17 Colo. 189; Hayes v. Williams, 17 Colo. 465. Under Act 1877, damages are compensation. Denver & R. G. R. Co. v. Spencer, 27 Colo. 313.

of this kind * * * is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased in case his life had not been terminated by the wrongful act, neglect, or default of the defendant. Such sum will depend on a variety of circumstances and future contingencies, and will therefore be difficult of exact ascertainment; but the damages to be awarded in each case may be approximated by considering the age, health, condition in life, habits of industry or otherwise, ability to earn money on the part of the deceased, including his or her disposition to aid or assist the plaintiff. Not only the kinship or legal relation between the deceased and the plaintiff, but the actual relations between them, as manifested by acts of pecuniary assistance rendered by the deceased to the plaintiff, and also contrary acts, may be taken into consideration.”¹⁰⁰ “It is, however, exceedingly clear that while it is permitted to give testimony concerning the relations of the deceased to the plaintiff in order to form a just estimate of the probable damage, yet the recovery is not to be measured or determined by the extent of the contributions or support furnished by the one to the other. In other words, although the deceased, as a son, may never yet have contributed to the support of his father, yet when the son’s age, habits, earning capacity, and the age of the father are once

¹⁰⁰ *Pierce v. Connors*, 20 Colo. 178, 182; *Kansas Pacific Ry. Co. v. Lundin*, 3 Colo. 101. Life tables are admissible to show the probable duration of the life terminated by the wrongful act. *Kansas Pacific Ry. Co. v. Lundin*, 3 Colo. 104; *Denver, S. P. & P. Ry. Co. v. Woodward*, 4 Colo. 9. But the jury are not controlled by such tables. *Colorado C. & I. Co. v. Lamb*, 6 Colo. App. 255.

established, a recovery may be had for the probable injury which the father has sustained in the loss of his son."¹⁰¹

The recovery is measured by the estimated accumulations of the deceased, having reference to the probable duration of his life and his habits and condition.¹⁰² Damages for the mental anguish of the plaintiff caused by the death are not recoverable,¹⁰³ and the words in the statute, "also having regard to the mitigating or aggravating circumstances attending any such wrongful act," are construed to mean such circumstances as affect the actual damages sustained, and not such as would permit exemplary damages.¹⁰⁴

By statute, exemplary damages may be recovered where the injury resulted from gross negligence or was willfully inflicted.¹⁰⁵

§ 21. Right of action ground for administration.

In the absence of other assets, a right of action given by statute to the personal representative to recover for the death is ground for administration.

There are conflicting decisions upon the question

¹⁰¹ *Mollie Gibson C. M. & M. Co. v. Sharp*, 5 Colo. App. 321; *brothers and sisters, Denver, S. P. & P. R. Co. v. Wilson*, 12 Colo. 26; *wife and adult daughter, Union Pacific Ry. Co. v. Jones*, 21 Colo. 340. See, also, on damages, *Hindry v. Holt*, 24 Colo. 464; *Brennan v. Molly Gibson C. M. & M. Co.*, 44 Fed. 795.

¹⁰² *Kansas Pacific Ry. Co. v. Lundin*, 3 Colo. 101; *Denver, S. P. & P. Ry. Co. v. Woodward*, 4 Colo. 1.

¹⁰³ *Kansas Pacific Ry. Co. v. Miller*, 2 Colo. 464; *Union Pacific Ry. Co. v. Jones*, 21 Colo. 340.

¹⁰⁴ *Moffatt v. Tenney*, 17 Colo. 189.

¹⁰⁵ *Mills' Ann. St. § 1512*. See *Moffatt v. Tenney*, 17 Colo. 189; *French v. Deane*, 19 Colo. 504. They can only be recovered when pleaded and proved under this statute. *Hayes v. Williams*, 17 Colo. 465.

whether the right of action which the statutes confer upon a personal representative to recover damages for the death for the benefit of the widow and next of kin is such assets as will support a grant of letters of administration in the state of which the deceased was a resident, or a grant of ancillary letters in the state where the injury happened. The weight of authority considers this right of action assets giving the probate court jurisdiction.¹⁰⁶

The cases taking the other view proceed upon the theory that the claim is owned by the beneficiaries, and that, as it is not subject to the debts of the deceased, it is not assets, and, unless the deceased left other property in the jurisdiction, letters of administration cannot be granted.¹⁰⁷ Looked at from the standpoint of the statutes giving jurisdiction to the probate courts over estates of deceased persons, this is doubtless the more

¹⁰⁶ "No doubt * * * an administrator might be appointed for the sole purpose of bringing such an action." *Sargent v. Sargent*, 168 Mass. 420, 423; *McGhee v. McCarley* (C. C. A.) 91 Fed. 462; *Boston & M. R. R. v. Hurd* (C. C. A.) 108 Fed. 116; *Brown's Adm'r v. Louisville & N. R. Co.*, 97 Ky. 228; *Findlay v. Chicago & G. T. Ry. Co.*, 106 Mich. 700; *Hutchins v. St. Paul, M. & M. Ry. Co.*, 44 Minn. 5; *Morris v. Chicago, R. I. & P. Ry. Co.*, 65 Iowa, 727; *Missouri Pacific Ry Co. v. Lewis*, 24 Neb. 848; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *Hartford & N. H. R. Co. v. Andrews*, 36 Conn. 213.

¹⁰⁷ *Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477; *Perry v. St. Joseph & W. R. Co.*, 29 Kan. 420; *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177. It has been held that the defense that the probate court had no jurisdiction to appoint the administrator is open. *Perry v. St. Joseph & W. R. Co.*, 29 Kan. 420; *Scott v. McNeal*, 154 U. S. 34. But see *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *Holmes v. Oregon & C. Ry. Co.*, 5 Fed. 523; *Boston & M. R. R. v. Hurd* (C. C. A.) 108 Fed. 116.

logical result; yet it cannot be assumed that the legislature intended a statute so highly remedial as that granting compensation for death to be nugatory in a great number of cases, and it should be considered that the jurisdiction of the probate court has, by the passage of such an act, been enlarged.

§ 22. Foreign administrator.

A foreign administrator or executor cannot sue in the jurisdiction where the injury was received without taking ancillary letters.

By a statute in Indiana passed for the benefit of non-residents, a foreign administrator may sue there for the death of his intestate;¹⁰⁸ but in the absence of such a statute the states generally hold that, to give a personal representative appointed by a foreign jurisdiction any standing in their courts, he must have been appointed by the proper tribunal within their territory. This is an objection which must be specially pleaded, and the defect may be cured by the grant of letters at any time before judgment.¹⁰⁹ The fact of the plaintiff's appointment as administrator in another state is immaterial.¹¹⁰

¹⁰⁸ *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 48; *Memphis & C. P. Co. v. Pikey*, 142 Ind. 304; *Wabash, St. L. & P. Ry. Co. v. Shacklet*, 105 Ill. 364.

¹⁰⁹ *Beaman v. Elliot*, 10 Cush. (Mass.) 172; *Com. v. East Boston Ferry Co.*, 13 Allen (Mass.) 589; *Dearborn v. Mathes*, 128 Mass. 194; *Bell's Adm'r v. Nichols*, 38 Ala. 678; *Lawrence v. Nelson*, 143 U. S. 215; *Dennick v. Central R. Co.*, 103 U. S. 11; *Smith v. Madden*, 78 Fed. 833; *South Western R. Co. v. Paulk*, 24 Ga. 356; *Maysville Street R. & T. Co. v. Marvin* (C. C. A.) 59 Fed. 91. He cannot sue in the federal courts when he may not in the state court. *Contra*, *Kansas Pacific Ry. Co. v. Cutter*, 16 Kan. 563; *Hodges v. Kimball* (C. C. A.) 91 Fed. 845.

When death statute permits the survival of intestate's right of

§ 23. Conflict of laws.

The proper party to bring the action is determined by the law of the place where the injury occurred; and, if the statute conferring the right also limits or defines the measure of damages, it will be followed in another jurisdiction.

The law of the jurisdiction within which the injury happens fixes the substantive rights of the parties. If the rights there acquired are under the common law, they will be enforced elsewhere; but if they are given by statute there is some difference of opinion whether they will be enforced unless the law of the forum grants substantially similar rights. In the United States courts the right acquired under a foreign statute will be enforced regardless of the remedy provided by the law of the forum, but in Massachusetts such rights have been recognized only where they take the form of assets of the estate of the deceased, and not where the foreign statute grants merely a power to sue for the benefit of certain persons, without regard to the question whether it is a property right of the deceased.¹¹¹ Where, however, the forum will enforce the rights acquired in the foreign jurisdiction, the law of the latter place designates the

action, it is local, and the right of action does not pass to a foreign administrator. Otherwise where the statute creates a new right of action in the administrator. *Lyon v. Boston & M. R. Co.*, 107 Fed. 386.

Although intestate was a resident of the same state as the defendant, and the beneficiaries also live there, an administrator appointed in another state may sue in the federal court. *Harper v. Norfolk & W. R. Co.*, 36 Fed. 102; *Chicago & N. Ry. Co. v. Whitton's Adm'r*, 13 Wall (U. S.) 270.

¹¹⁰ *Infra*, § 23, note 112.

¹¹¹ *Supra*, § 7.

proper party to bring the action; and the suit must be brought by him, even if the statutes of the forum designate a different plaintiff. The greater number of the statutes of the different states giving a remedy for death by wrongful act provide that the personal representative shall bring suit for the benefit of the widow and next of kin. In such cases the executor or administrator must sue, and, although he may have been properly appointed in the state of which his intestate was a resident, he must take out ancillary letters in the state where the suit is brought.¹¹²

¹¹² Higgins v. Central New England & W. R. Co., 155 Mass. 176; Burns v. Grand Rapids & I. R. Co., 113 Ind. 169; Selma, R. & D. R. Co. v. Lacey, 49 Ga. 106; Gurney v. Grand Trunk Ry. Co., 59 Hun (N. Y.) 625; Stone v. Groton B. & M. Co., 77 Hun (N. Y.) 99; Wooden v. Western N. Y. & P. R. Co., 126 N. Y. 10; Usher v. West Jersey R. Co., 126 Pa. 206; Lower v. Segal, 59 N. J. Law, 66; Nashville & C. R. Co. v. Sprayberry, 67 Tenn. 341; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291; Hulbert v. City of Topeka, 34 Fed. 510; Boston & M. R. Co. v. McDuffey (C. C. A.) 79 Fed. 934; Dennick v. Central R. Co., 103 U. S. 11.

Where, by the foreign statute, the state was the plaintiff, and the damages were to be paid to the administrator, it was held that, as this plaintiff was only nominal, a domestic administrator might sue. Stewart v. Baltimore & O. R. Co., 168 U. S. 445. But it has been held that, if the plaintiff is invested by the foreign law with duties and powers that are not recognized by, or are inconsistent with, the laws of the forum, he cannot sue. McCarthy v. Chicago, R. I. & P. R. Co., 18 Kan. 46; Limekiller v. Hannibal & St. J. R. Co., 33 Kan. 83; Woodard v. Michigan S. & N. I. R. Co., 10 Ohio St. 121; Ash v. Baltimore & O. R. Co., 72 Md. 144; Vawter v. Missouri Pacific Ry. Co., 84 Mo. 679; Taylor's Adm'r v. Pennsylvania Co., 78 Ky. 348 (see Bruce's Adm'r v. Cincinnati R. Co., 83 Ky. 174); St. Louis, I. M. & S. Ry. Co. v. McCormick, 71 Tex. 660; Richardson v. New York Cent. R. Co., 98 Mass. 85; *supra*, § 7.

Where the accident causing death happened in Indiana, and the widow gave a release in Maryland, the effect of the release was to

Where the statute which confers the right of action also limits the damages or prescribes the measure of them, the forum will follow the rule laid down by it. In the absence of any such limitation, the matter of damages is considered a part of the remedy, and governed by the laws in force in the forum.¹¹³ But if the statute imposes the limit or measure of damages as a penalty, and not as compensation for the injury, then the case falls within the general rule that the penal statutes of one jurisdiction will not be enforced in another, and the plaintiff cannot, therefore, enforce the rights acquired by him under it.¹¹⁴ Several of the Massachusetts acts which provide a minimum and maximum limit have been regarded as penal statutes unenforceable outside the jurisdiction.

In a case where there was no limit of damages which might be recovered for the death, a federal court has said: "In a large number of states where the limit for loss of life has been fixed by legislation, the sum of \$10,000 has been fixed as the maximum allowance to be made. This is a legislative construction of a fair maximum sum to be awarded in such cases. I think the court may properly, therefore, accept this concurrent judgment of so many different state legislatures as justifying it in saying that the maximum ought not in any one of these cases to exceed that sum."¹¹⁵

Whether or not an action survives the death of the employe likewise depends upon the law of the place

be judged by the Indiana law. *Cowen v. Ray* (C. C. A.) 108 Fed. 320.

¹¹³ *Northern Pacific R. Co. v. Babcock*, 154 U. S. 190; *Hanna v. Grand Trunk Ry. Co.*, 41 Ill. App. 116.

¹¹⁴ *Marshall v. Wabash R. Co.*, 46 Fed. 269; *Lyman v. Boston & (132)*

where the injury occurred;¹¹⁶ and by the same law is to be tested the validity of contracts affecting liability.¹¹⁷

The benefits of the act may be obtained by a nonresident and an alien. Thus, a mother in Ireland dependent upon her son for support may bring an action in Massachusetts under the act.¹¹⁸

§ 24. Releases.

A plaintiff may by contract release his claim for damages. The validity of such an agreement depends upon the rules applicable to contracts generally.

If a deceased employe has released his rights, his representative cannot sue.

Validity.

A contract made by a servant releasing his cause of action against his employer is, in the absence of fraud or mistake, a bar to the later enforcement of the claim. The fact that these releases are often obtained from ignorant persons, and at a time when the servant is suffering from injuries received, has led the courts to scrutinize them with some care, and to set them aside upon slight evidence of misrepresentation or fraud on the

A. R. Co., 70 Fed. 409; *Richardson v. New York Cent. R. Co.*, 98 Mass. 85. See *supra*, § 7.

¹¹⁶ *Farmers' L. & T. Co. v. Toledo, A. A. & N. M. Ry. Co.*, 67 Fed. 73.

¹¹⁶ *Davis v. New York & N. E. R. Co.*, 143 Mass. 301; *Martin's Adm'r v. Baltimore & O. R. Co.*, 151 U. S. 673.

¹¹⁷ *Liverpool & G. W. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397.

¹¹⁸ *Mulhall v. Fallon*, 176 Mass. 266; *Vetaloro v. Perkins*, 101 Fed. 393. See, also, *Dennick v. Central R. Co.*, 103 U. S. 11; *Luke v. Calhoun County*, 52 Ala. 115. Contra, *Deni v. Pennsylvania R. Co.*, 181 Pa. 525; *Brannigan v. Union Gold-Min. Co.*, 93 Fed. 164.

part of the person securing them. But if circumstances indicating fraud are absent, the compact cannot be impeached upon the ground that the party signing it did not read it or did not understand its contents. Such conduct is gross negligence, against which the courts will not relieve. If he does not understand the paper, he should seek assistance, and, in the absence of such a request, he cannot complain that he did not know what he signed.¹¹⁹ The view of the Massachusetts court in regard to releases of claims is thus expressed: "So far as we can see, it was an uncontroverted fact in the case that he was a man capable of acting for himself, and who understood the ordinary transactions of life. When such a man, understandingly and for a valuable consideration, executes a written release, it is a principle of law that his act discharges his cause of action; and not only is it a principle of law, but an important and wholesome one, which it is the right and duty of courts to state and enforce when the proper occasion arises."¹²⁰ But if the transaction is tainted with fraud, the release will not bar a subsequent suit.¹²¹

A release, like any other contract, requires consideration, and, if there is no actual consideration, in those states where a seal is made presumptive evidence the re-

¹¹⁹ *Leddy v. Barney*, 139 Mass. 394; *Squires v. Inhabitants of Amherst*, 145 Mass. 192; *Rogers v. Place*, 29 Ind. 577; *Nebeker v. Cut-singer*, 48 Ind. 436; *Guldager v. Rockwell*, 14 Colo. 459; *Upton v. Tribilcock*, 91 U. S. 45. See, also, *Albrecht v. Milwaukee & S. Ry. Co.*, 87 Wis. 105; *Wallace v. Chicago, St. P., M. & O. Ry. Co.*, 67 Iowa, 547.

¹²⁰ *McGuire v. Lawrence Mfg. Co.*, 156 Mass. 324, 328.

¹²¹ *Bliss v. New York Cent. & H. R. R. Co.*, 160 Mass. 447; cases *supra*.

lease may be disregarded.¹²² A promise to give employment is a sufficient consideration.¹²³ The validity and effect of a release do not depend upon the validity of the claim. If a claim is made and released, the contract is good, although the person released was not in fact liable for the injury.¹²⁴

The written release cannot be varied by parol evidence, and, if it is in terms a release of all demands, it cannot be shown that the understanding was to except certain claims.¹²⁵ But if the release specifies particular injuries, and then contains a phrase of general release, it will be construed to apply to such causes of action or injuries only as are particularly mentioned in it.¹²⁶ Where there are several tort feasons, a release given to one discharges all.¹²⁷

Return of consideration.

If a plaintiff, having given a release, afterwards brings suit, the question whether he is bound to refund the consideration given him depends upon the question

¹²² *Wabash Western Ry. v. Brow* (C. C. A.) 65 Fed. 941.

¹²³ *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109; *Pierce v. Tennessee C., I. & R. Co.*, 173 U. S. 1. See *Gulf, C. & S. F. Ry. Co. v. Winton*, 7 Tex. Civ. App. 57.

¹²⁴ *Leddy v. Barney*, 139 Mass. 394. As to construction of release, see *Indianapolis Union Ry. Co. v. Houlihan* (Ind.) 60 N. E. 943.

¹²⁵ *Brown v. City of Cambridge*, 3 Allen (Mass.) 474; *Squires v. Inhabitants of Amherst*, 145 Mass. 192. Where the release stated that the consideration was \$100, it might be shown that a promise of employment was also a part of the consideration. *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109.

¹²⁶ *Union Pacific Ry. Co. v. Artist* (C. C. A.) 60 Fed. 365.

¹²⁷ *Gross v. Ellison*, 136 Mass. 503; *Aldrich v. Parnell*, 147 Mass. 409.

whether the release was a settlement in full of all causes of action, or only a part payment or settlement of one of several demands. Thus, where a plaintiff was entitled to rescind the contract on the ground of fraud, and by his understanding of the contract he received the money as a gratuity during his disability, and not as a discharge of his claim, it was held that he need not return it before beginning suit.¹²⁸ And likewise where the plaintiff understood that the money paid was for the damage to his property, and not to his person, and in his action disclaimed any recovery for that damage, he did not need to refund it.¹²⁹ In this case it was said: "It is plain that the plaintiff's release and receipt do not of themselves stand in the way of his maintaining the action, because, so far as they relate to his personal injury, they must now be assumed to have been obtained from him by fraud. The release and receipt are to be read as if they did not purport to discharge any claim he might have for personal injury, and by reason of the fraud the case is free from any question of the admissibility of parol evidence to vary or control the writing. But the objection is that the retention of the money precludes him. It is true, under our decisions, that the injury to the plaintiff's person and to his clothing furnished but one cause of action, and that a recovery of judgment by him for the injury to his clothing would have barred a subsequent action for his personal injury.

¹²⁸ *Mullen v. Old Colony R. Co.*, 127 Mass. 86. Where release provided for payment of doctor's bills, need not refund the sums paid to these third parties. *Town of Colorado City v. Liafe* (Colo.) 65 Pac. 630.

¹²⁹ *Bliss v. New York Cent. & H. R. R. Co.*, 160 Mass. 447.

* * * In the present case, however, the plaintiff has recovered no judgment and has brought no prior action for the injury to his clothing, and the question which we have to determine is whether, before bringing this action, he was bound to return the seventeen dollars received for the injury to his clothing, and whether the action is defeated by the omission so to return it. The defendant contends that accepting payment for a part of the injury which he sustained, and retaining the money, debars the plaintiff from maintaining an action for the other part of the injury, just as the recovery of a judgment for one part of the injury would debar him. But there are good reasons for holding the contrary doctrine. If one sues to recover for an injury, he may well be held to include in his action all that he is entitled to sue for in respect to that cause of action. But if one is making a settlement, the same reasons do not apply, and if he cannot make a full settlement he may make a partial one, and thus eliminate one element out of the controversy.

* * * Now, if such was the oral agreement of settlement as to a part of the loss, and the owner was by fraud led to sign a receipt for his whole claim, and if he afterwards sues for that part of his loss which has not been paid for, and is able to set aside and avoid the terms of his receipt by reason of the fraud, there is no good reason why the payment for his loss upon one piece of his property should debar him from recovering for the loss upon the rest, even though he retains the money so paid to him. Why should he pay it back, when it represents only the sum agreed on for his compensation for that portion of his loss which he no longer seeks to recover for? So here. The plaintiff must now be deemed

to have received the seventeen dollars for the injury to his clothing alone. This much was adjusted between the parties and paid for. The plaintiff, although he included a claim for damage to clothing in his declaration, does not now seek to recover for that loss, or to avoid the settlement which he says he actually made with the defendant's agent. On the other hand, he stands to and affirms all that was included in the settlement actually made. If it was understood at the time that the payment was received only for the injury to his clothing, and that no claim for personal injury was settled for or released, and if the release and receipt were by fraud so phrased as to cover that claim also, and if they are avoidable by reason of the fraud so far as the claim for personal injury is concerned, the plaintiff was under no obligation to return the money received by him for the injury to his clothing before bringing his action for the personal injury." But unless it appears that the plaintiff was induced to believe that he was settling for a part only of his damages, he must refund the money paid before he can recover.¹³⁰

Releases by infants.

A release given by an infant is, like his other contracts, voidable by him; nor is a compromise made by

¹³⁰ *Drohan v. Lake Shore & M. S. Ry. Co.*, 162 Mass. 435. *Moore v. Massachusetts Ben. Ass'n*, 165 Mass. 517. See, also, *Vanderelden v. Chicago & N. W. Ry. Co.*, 61 Fed. 54; *Pangborn v. Continental Ins. Co.*, 67 Mich. 683; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75. That the consideration need not be returned, see *Sheanon v. Pacific Mut. Life Ins. Co.*, 83 Wis. 507. As to authority of attorney to give release, see *New York, N. H. & H. R. Co. v. Martin*, 158 Mass. 313; *Dalton v. West End St. Ry. Co.*, 159 Mass. 221.

his next friend valid unless brought to the attention of the court. Although the next friend has power to conduct the suit and discharge the judgment, yet "when he assumes finally to conclude a settlement out of court, and to discharge the cause of action by an agreement *in pais*, under which he accepts less than the plaintiff's entire demand, he does more than is clearly within his authority to prosecute the action, and more than we think ought to be allowed with due regard to the protection of the infant. Unless such a settlement is affirmed, either in terms if brought to the attention of the court, or by an entry of judgment in regular course, it may fairly be held invalid. * * * It is no injustice to the defendant to hold that the infant is not concluded until the cause is disposed of by judgment."¹³¹ In Alabama, even the right to enter up judgment is denied to the next friend.¹³² A guardian as well as a next friend may bring an action for an infant,¹³³ and a compromise effected by a guardian may be sanctioned by the court appointing him.

Releases under Lord Campbell's act.

Under statutes similar to Lord Campbell's act, by which a remedy is given for death by wrongful act, there has been some difference of opinion whether this remedy is to be regarded as a new right of action, or whether it "only substituted the right of the representatives to sue in place of the right which the deceased

¹³¹ Tripp v. Gifford, 155 Mass. 108.

¹³² Tennessee C., I. & R. Co. v. Hayes, 97 Ala. 201.

¹³³ Burke v. Burke, 170 Mass. 499.

himself would have had if he had survived."¹³⁴ The courts which consider that it is a new right say that "the form of expression employed in the act shows that the legislature had in mind the case of a party entitled to maintain an action, but whose right of action was by the rule of the common law extinguished by his death, and not the case of one who had maintained his action or who had recovered damages."¹³⁵ Accordingly it is held that if the deceased, in his lifetime, released his claim for damages, his personal representatives cannot maintain an action.¹³⁶ The representatives are also barred if the deceased had recovered damages for the injury,¹³⁷ or, in some jurisdictions, waived liability for the injury by his contract.¹³⁸

¹³⁴ *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357; *Hecht v. Ohio & M. Ry. Co.*, 132 Ind. 507.

¹³⁵ *Littlewood v. City of New York*, 89 N. Y. 24.

¹³⁶ *Read v. Great Eastern Ry. Co.*, L. R. 3 Q. B. 555; *Brown v. Chattanooga Electric Ry. Co.*, 101 Tenn. 252; *Dibble v. New York & E. R. Co.*, 25 Barb. (N. Y.) 183; *Price v. Richmond & D. R. Co.*, 33 S. C. 556. But see *Illinois Cent. R. Co. v. Cozby*, 69 Ill. App. 256.

¹³⁷ *Hecht v. Ohio & M. Ry. Co.*, 132 Ind. 507; *Littlewood v. City of New York*, 89 N. Y. 24. But pendency of an action brought by him is not a bar, *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143. Nor a nonsuit, *Denver & R. G. R. Co. v. Iles*, 25 Colo. 19; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349. Nor the pendency of another action by a different party for the same cause, *Tennessee C., I. & R. Co. v. Herndon*, 100 Ala. 451; *Augusta Ry. Co. v. Glover*, 92 Ga. 132. But see *Conner's Adm'x v. Paul*, 75 Ky. 144.

An administrator may recover for his intestate's suffering under the act, and judgment is not a bar to a subsequent action by him under the railroad statute for the death. *Clare v. New York & N. E. R. Co.*, 172 Mass. 211.

¹³⁸ *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357; *Western & A. R. Co. v. Strong*, 52 Ga. 461. As to free passes on railroads, see

The question has been raised whether or not a release of damages for causing the death of a human being is justified by public policy; and although it was not necessary to decide it, yet, in view of the fact that the Massachusetts statute is penal in its nature, it would probably be considered that such a release would be invalid. It has been decided that an intestate cannot release the defendant from liability for his death imposed by the statute relating to railroad accidents.¹³⁹

But unless the statute is penal it is held that the person to whom the right of action is given has the right to control the suit and to compromise it, without consulting the beneficiaries.¹⁴⁰

The beneficiaries may give releases of damages caused them by the death, and, when one of them does so, it does not operate to defeat the action, but bars any recovery by the person signing it. If the suit is by the administrator of the wife, a release by the husband only defeats his portion of the damages;¹⁴¹ but if all the beneficiaries give releases, so that all are barred, then an action by the representative cannot be maintained.¹⁴²

Adams v. Northern Pacific Ry. Co., 95 Fed. 938; *Doyle v. Fitchburg R. Co.*, 166 Mass. 492.

¹³⁹ *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 71, and cases cited.

¹⁴⁰ *Yelton v. Evansville & I. R. Co.*, 134 Ind. 414; *Cogswell v. Concord & M. Railroad*, 68 N. H. 192; *Stephens v. Nashville, C. & St. L. Railway*, 10 Lea (Tenn.) 448; *Natchez Cotton Mills Co. v. Mullins*, 67 Miss. 672; *Holder v. Nashville, C. & St. L. R. Co.*, 92 Tenn. 141. But see *Styles v. Penn Steel Co.*, 7 Del. Co. Ct. R. 456.

¹⁴¹ *South & N. A. R. Co. v. Sullivan*, 59 Ala. 272; *Pittsburgh, C., C. & St. L. Ry. Co. v. Moore*, 152 Ind. 345; *Pittsburgh, C., C. & St. L. Ry. Co. v. Hosea*, 152 Ind. 412; *Toole v. Jones*, 32 Pittsb. Leg. J. 387.

¹⁴² *Christe v. Chicago, R. I. & P. Ry. Co.*, 104 Iowa, 707; *Sykora v.*

§ 25. Contracts waiving act.

A contract waiving the benefits secured to a servant by the act, and relieving the master from liability for his own negligence or that of his servants, is invalid.

The right to make such contracts as the parties choose "is one not given by the legislature, but inherent, necessarily involved in the ownership of property, and as a primary prerogative of freedom."¹⁴³ "While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence; and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."¹⁴⁴

Case Threshing Mach. Co., 59 Minn. 130; Stuebing v. Marshall, 10 Daly (N. Y.) 406.

¹⁴³ Pittsburgh, C., C. & St. L. Ry. Co. v. Cox, 55 Ohio St. 497, 510.

¹⁴⁴ Frisbie v. United States, 157 U. S. 160, 165; Opinion of the Justices, 163 Mass. 589.

The contracts which are held invalid by the courts or are forbidden by the legislature are those considered contrary to the policy of the state, and inimical to the lives, health, or morals of its citizens. It may be perfectly proper for one individual to contract with another that if he is carried to a certain place he will assume all risk of the negligence of the other during the transportation; but, when a similar contract is made between a passenger or a shipper of goods and a common carrier, the greater number of the states have held that such a contract is invalid, since it absolves the carrier from one of the duties which it owes, from the public nature of its employment, to the public, and is dangerous to the safety of the citizens.¹⁴⁵ Yet this is a question of policy to be determined by the jurisdiction, and such contracts are often supported.¹⁴⁶ This supervision of contracts by the state has been often exercised where the relations of master and servant are concerned. "This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubt-

¹⁴⁵ *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Grand Trunk Ry. Co. v. Stevens*, 95 U. S. 655; *Steele v. Townsend*, 37 Ala. 247; *Alabama G. S. R. Co. v. Thomas*, 83 Ala. 343; *Merchants' D. & T. Co. v. Cornforth*, 3 Colo. 280; *Ohio & M. Ry. Co. v. Selby*, 47 Ind. 471; *Louisville, N. A. & C. Ry. Co. v. Faylor*, 126 Ind. 126; *Squire v. New York Cent. R. Co.*, 98 Mass. 239; *Bates v. Old Colony R. Co.*, 147 Mass. 255; *Quimby v. Boston & M. R. Co.*, 150 Mass. 365. See, also, *Jacobus v. St. Paul & C. Ry. Co.*, 20 Minn. 125.

¹⁴⁶ *McCawley v. Furness Ry. Co.*, L. R. 8 Q. B. 57; *Hall v. North Eastern Ry. Co.*, L. R. 10 Q. B. 437; *Welles v. New York Cent. R. Co.*, 26 Barb. (N. Y.) 641; *Maguin v. Dinsmore*, 56 N. Y. 168.

less been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employes as to demand special precautions for their well-being, or the safety of adjacent property. * * * While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina, and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary, prior to the adoption of the constitution, for the protection of the operatives; but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on, with due regard to the safety and health of those engaged in them, without special protection against dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the states designed to meet these exigencies and to secure the safety of persons peculiarly exposed to these dangers. Within this general category are ordinances providing for fire escapes for hotels, theaters, factories, and other large buildings, a municipal inspection of boilers, and appliances designed to secure passengers upon railways and steamboats against the dangers necessarily incident to these methods of transportation. In states where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact, for the cleanliness and ventilation of working rooms, for the guarding of well holes, stairways, and elevator shafts,

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and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls, for ventilation shafts, bore holes, escapement shafts, means of signaling the surface, for the supply of fresh air, and the elimination, as far as possible, of dangerous gases, for safe means of hoisting and lowering cages, for a limitation upon the number of persons permitted to enter a cage, that cages shall be covered, and that there shall be fences and gates around the tops of shafts, besides other similar precautions. These statutes have been repeatedly enforced by the courts of the several states, their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional. * * * In other states, laws have been enacted limiting the hours during which women and children shall be employed in factories; and while their constitutionality, at least as applied to women, has been doubted in some of the states, they have been generally upheld."¹⁴⁷ To this list should be added the employers' liability act, which is dictated by the same policy of safeguarding a large proportion of the community in their daily occupations.

Whether or not a contract between a servant and a master relieving the latter from liability for his negligence is valid must depend solely upon the policy of the state. Such a contract made between individuals is not invalid; but the question is not to be decided upon considerations pertaining to individuals, but by

¹⁴⁷ *Holden v. Hardy*, 169 U. S. 366, 391, 393; *Opinion of the Justices*, 163 Mass. 589; *supra*, § 4. But whether these statutes permit the assumption of risks, see section 116.

the effect of such contracts upon the community at large. Persons standing in the relation of master and servant have become a class by themselves, and a numerous class. The magnitude of business enterprises, the danger of them, and the number of persons concerned in them have caused the legislature to interfere in the conduct of them, and adopt such regulations as shall better secure the safety of all concerned. To permit contracts relieving a master from liability would render nugatory all these precautions. And if it be said that a servant is free to take the risk or not, as he pleases, yet the answer is that the safety of the public generally is not to be jeopardized by the carelessness which such contracts would induce. In this aspect the question is analogous to the case of common carriers.

In England it was at once, upon the passage of the act, decided that a servant could by contract agree not to claim compensation from his employer for injuries suffered through the negligence of the employer or of his servant in respect of any defect, negligent act or omission under the act or otherwise;¹⁴⁸ and the effect of this decision has been to bar large numbers of employes from the benefits intended to be secured to them. In New York and Georgia such contracts are also permitted.¹⁴⁹

In Alabama, where by the rule of a railroad it was stipulated that the regular compensation paid should cover all risks incurred and liability to accident from

¹⁴⁸ *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357.

¹⁴⁹ *Western & A. R. Co. v. Bishop*, 50 Ga. 465; *Fulton B. & C. Mills v. Wilson*, 89 Ga. 318; *Purdy v. Rome, W. & O. R. Co.*, 125 N. Y. 209.

any cause, that any claim to compensation would not be recognized, and that remaining in the service was an acceptance of these conditions, it was held that "the statute makes the employer answerable in damages when an employe is injured in any of the classes of negligence specified therein. Such a stipulation, being in contravention of the statutory provisions, is opposed to public policy, and does not avail to secure nonliability for an injury caused to an employe by defendant's own negligence or misconduct in the cases specified in the statute."¹⁵⁰

"Railroads, like other corporations and persons, have the right to adopt reasonable rules and regulations for the government of their employes, and for their own protection; but they cannot stipulate for immunity from liability for their own wrongful negligence. A rule which imposes upon an employe to look after and be responsible for his own safety contravenes the law itself, which fixes the liability of railroads for negligence causing injury or death to their employes."¹⁵¹ Rules which require a servant to use care to protect himself and to make such an examination of the appliances furnished as is reasonably within his power do not contravene the law, and it is a question for the jury whether the employe has obeyed the rule. "So far as rule 140 or any other rule militates against the liability imposed upon an employer or master under section 2590 of the Code, or contravenes the principle of law which requires the employer or master to furnish and maintain suitable ma-

¹⁵⁰ *Hissong v. Richmond & D. R. Co.*, 91 Ala. 514, 517; *Richmond & D. R. Co. v. Jones*, 92 Ala. 218.

¹⁵¹ *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 554.

terial and appliances for the safe prosecution of its business, and the right of the employe to presume that this has been done, it will be regarded as wholly inoperative, and afford no protection to the employer or master; but so far as rule 140 imposes the duty upon employes to examine for their own safety the condition of the cars, engines, and machinery, etc., before using them or exposing themselves on or with the same, so as to ascertain, as far as reasonably can be done, their condition and soundness, the rule is reasonable and proper. It cannot be expected of car conductors or brakemen to make the same careful examination, and to be able to discover defects to the same extent, as that required of the employer or master or person intrusted with this duty for the public safety or safety of employes. * * * To the extent of their information and the opportunities afforded to make such examination consistently with their other duties, and the circumstances attending, they should observe and obey the rule."¹⁵²

Where, in a brakeman's written application for employment, he undertook, as soon as possible, to make a careful examination of things near the track, so that he might understand the dangers attending them, it was held that he could not recover for being struck by a station roof which he undertook and had an opportunity to examine.¹⁵³

¹⁵² *Memphis & C. R. Co. v. Graham*, 94 Ala. 545, 555; *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211.

¹⁵³ *Quinn v. New York, N. H. & H. R. Co.*, 175 Mass. 150. In *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 137, it is said that "the statute does not attempt to take away the right of the parties to make such contracts as they choose, which will establish (148)

The policy which forbids a servant to agree not to hold his master liable for his negligence does not affect the doctrine of assumption of risk. The servant impliedly agrees, when he enters the employment, to take the risk of injury from the conditions he finds, and an express contract which merely puts into words this implied agreement is not invalid. The contract which is forbidden is that which looks to a future negligent condition, and which barter away the servant's right to compensation arising from negligence of which he did not know or which he could not foresee when he entered the service.

There seems to be no distinction when the contract is one waiving the servant's rights at common law, or when it relinquishes his rights under the act. The passage of a statute by the legislature is a declaration of the policy of the state in that regard, and a contract waiving such a statute would be as contrary to public policy as if it waived a common-law liability.

Statutes.

In many of the states, statutes have been passed prohibiting the making of contracts relieving a master from liability for his negligence.¹⁵⁴ It has been held that

their respective rights and duties. * * * It would be an unwarranted construction of the statute, which would tend to defeat its object, to hold that laborers are no longer permitted to contract to take the risk of working where there are peculiar dangers from the arrangement of the place, and from the kind and quality of the machinery used. Nothing but the plainest expression of intention on the part of the legislature would warrant giving the statute such an interpretation." This language was directed to the point that the defense of assumption of risk was available as well under the act as at common law. See *infra*, § 116.

¹⁵⁴ Acts Mass. 1894, c. 508, § 6 (Acts 1877, c. 101, § 1): "No person

the Ohio statute was unconstitutional, but the court of

or corporation shall, by a special contract with persons in his or its employ, exempt himself or itself from any liability which he or it might be under to such persons for injuries suffered by them in their employment, and which result from the employer's own negligence or from the negligence of other persons in his or its employ."

This was subsequently modified to read as follows: "No person shall, by a special contract with his employes, exempt himself from liability which he may be under to them for injuries suffered by them in their employment, and resulting from the negligence of the employer, or of a person in his employ." Rev. Laws Mass. c. 106, § 16. See, also, Rev. Laws Mass. c. 106, § 15.

Burns' Rev. St. Ind. 1901, § 7087: "All contracts made by railroads or other corporations with their employes, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employe having a right of action under the provisions of this act, are hereby declared null and void."

Burns' Rev. St. Ind. 1901, § 7082a (Acts Ind. 1901, c. 225): "Release for Injuries. That all contracts between employer and employe releasing the employer from liability for damages arising out of the negligence of the employer by which the employe is injured, or, in case of the employe's death, to his representatives, are against public policy, and hereby declared null and void."

7082b: "Release of Third Person. That all contracts between employer and employe releasing third persons, copartnerships, or corporations from liability for damages arising out of the negligence of such third persons, copartnerships, or corporations by which the employe of such employer is injured, or, in case of the death of such employe, to his representatives, are against public policy, and are hereby declared null and void."

7082c: "Contracts Void—Exception. That all contracts between an employe and a third person, copartnership, or corporation, in which it is agreed that the employer of such employe shall be released from liability for damages of such employe arising out of the negligence of the employer, or, in case of the death of such employe, to his representatives, are against public policy, and are hereby declared null and void: provided, that nothing in this act shall apply to voluntary relief departments or associations organized for the purpose of insuring employes. Nothing in this act shall be construed to revert back to contracts made

last resort did not find it necessary to pass upon the question.¹⁵⁵

§ 26. Relief fund agreements.

An agreement whereby a servant becomes a member of a relief association on the understanding that, if he accepts the benefits of the association secured to him in the event of his injury, he shall release the master from liability, is valid.

Relief associations are a species of insurance, the funds of which are made up from contributions by the employes who become members and by the employer. When a member is injured or killed, he or his representatives receive certain sums agreed upon, and the employer is released from liability for the injury. These agreements are held valid, and not contrary to the common-law or statute rule that an employer cannot, by contract, limit his liability for negligence, wherever it appears that by the terms of the agreement the servant

prior to the passage of this act. Nor shall this act affect pending litigation: provided, that nothing in any section of this act shall be so construed as to affect or apply to any contract or agreement that may be made between the employer and employe, or, in case of death, his next of kin or his representative, after an injury to the employe has occurred, but the provisions of this act shall apply solely to contracts made prior to any injury."

See, also, Laws Ohio 1890, vol. 87, p. 149; Acts Wyo. 1891, c. 28; Code Iowa 1897, § 2071; Acts Fla. 1891, No. 62; Laws Tex. (Sp. Sess.) 1897, c. 6, § 4; Sandels & Hill's Dig. Ark. c. 130, § 6250; Gen. St. Minn. 1894, § 2701; Const. Mont. art. 15, § 16; Civ. Code Mont. § 2242; Laws N. M. 1893, c. 28; Laws Miss. 1898, c. 66; Rev. St. Mo. c. 17, § 2876; St. Wis. 1898, c. 87, § 1816; Rev. Codes N. D. 1899, § 3072; Priv. Laws N. C. 1897, c. 56.

¹⁵⁵ *Cox v. Pittsburgh, C., C. & St. L. Ry. Co.*, 1 Ohio N. P. 213, 33 Ohio Laws, 7; *Shaver v. Pennsylvania Co.*, 71 Fed. 931. But see *Pittsburgh, C., C. & St. L. Ry. Co. v. Cox*, 55 Ohio St. 497; *Peirce v. Van Dusen* (C. C. A.) 78 Fed. 693.

is given an option whether to receive the benefits or bring his action. "It is a choice between two sources of compensation where but a single one existed, and it is the final acceptance of one against the other that gives validity to the transaction."¹⁵⁶ In holding that such a contract did not come within the purview of a statute forbidding contracts limiting the master's liability, the court said: "Perhaps it is sufficient to say that it clearly appears the contract does not come within the terms of the inhibition, for the reason that the employe does not therein agree to waive a right to damages thereafter arising for personal injury or death. He agrees simply that he will elect, after the injury is incurred, which form of recompense he will demand.

* * * Taking the statute as a whole, the contract inhibited is a contract which by its terms waives the right of action on the part of the employe, while the contract in question does not seek to waive a right of action, but expressly reserves it, and only gives to his election of remedies made after the injury the effect of a waiver of the other remedy. To deny such a right

¹⁵⁶ Pittsburgh, C., C. & St. L. Ry. Co. v. Moore, 152 Ind. 345, overruling Pittsburgh, C., C. & St. L. Ry. Co. v. Montgomery, 152 Ind. 1; Pittsburgh, C., C. & St. L. Ry. Co. v. Hosea, 152 Ind. 412; Lease v. Pennsylvania Co., 10 Ind. App. 47; Pittsburgh, C., C. & St. L. Ry. Co. v. Elwood, 25 Ind. App. 671; Chicago, B. & Q. R. Co. v. McGraw, 22 Colo. 363; Griffiths v. Earl of Dudley, 9 Q. B. Div. 357; Owens v. Baltimore & O. R. Co., 35 Fed. 715; State v. Baltimore & O. R. Co., 36 Fed. 655; Martin v. Baltimore & O. R. Co., 41 Fed. 125; Otis v. Pennsylvania Co., 71 Fed. 136; Vickers v. Chicago, B. & Q. R. Co., 71 Fed. 139. Contra, Miller v. Chicago, B. & Q. Ry. Co., 65 Fed. 305; Chicago, B. & Q. R. Co. v. Miller (C. C. A.) 76 Fed. 439.

would be to deny a right to settle controversies."¹⁵⁷ A minor may bind himself by such a contract.¹⁵⁸ By the Massachusetts act, the amount received from the fund may be shown in reduction of damages.¹⁵⁹

¹⁵⁷ Pittsburgh, C., C. & St. L. Ry. Co. v. Cox, 55 Ohio St. 497, 510. See Shaver v. Pennsylvania Co., 71 Fed. 931.

¹⁵⁸ Clements v. London & N. W. Ry. Co. [1894] 2 Q. B. 482; Flower v. London & N. W. Ry. Co. [1894] 2 Q. B. 65.

¹⁵⁹ Acts Mass. 1887, c. 270, § 6; Rev. Laws Mass. c. 106, § 78.

CHAPTER III.

NOTICE AND LIMITATION OF ACTION.

- § 27. Notice.
- 28. "Time, Place, and Cause."
- 29. Inaccuracy.
- 30. Time for Giving Notice.
- 31. Person to Give Notice.
- 32. To Whom and How Notice is to be Given.
- 33. Effect of Notice.
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§ 27. Notice.

The act requires written notice of the time, place, and cause of the injury to be given by the plaintiff to the defendant within a limited time as a condition precedent to the right of action.

The acts of England,¹ Massachusetts,² and Colorado³ require the plaintiff to give notice of the injury to the

1 43 & 44 Vict. c. 42, § 4: "An action for the recovery under this act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks * * * from the occurrence of the accident: * * * provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice."

Section 7: "Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it
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employer within a limited time after its occurrence. This requisite of notice is, in substantially the same

was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers."

The notice may be served by delivering the same to, or at the residence or place of business of, the person on whom it is to be served. The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at, or by sending it by post in a registered letter addressed to, the office, or, if there be more than one office, any one of the offices of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defense by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

* Rev. Laws Mass. c. 106, § 75, now reads: "No action for the recovery of damages for injury or death under the provisions of sections seventy-one to seventy-four, inclusive, shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within sixty days, and the action is commenced within one year, after the accident which causes the injury or death. Such notice shall be in writing, signed by the person injured or by a person in his behalf; but if, from physical or mental incapacity, it is impossible for the person injured to give the notice within the time provided in this section, he may give it within ten days after such incapacity has been removed; and if he dies without having given the notice, and without having been for ten days at any time after his injury of sufficient capacity to give it, his executor or administrator may give such notice within sixty days after his appointment. A notice given under the provisions of this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place, or cause of the injury, if it is shown that there

terms, found in the statutes permitting an action against a municipal corporation for injuries received through a

was no intention to mislead, and that the employer was not in fact misled thereby. The provisions of section twenty-two of chapter fifty-one shall apply to notices under the provisions of this section."

See Acts Mass. 1887, c. 270, § 3, as amended by Acts 1888, c. 155, Acts 1892, c. 260, § 2, and Acts 1900, c. 446.

The section referred to is as follows (Rev. Laws Mass. c. 51, § 22): "A defendant shall not avail himself in defense of any omission to state in such notice the time, place, or cause of the injury or damage, unless, within five days after receipt of a notice, given within the time required by law, and by an authorized person, referring to the injuries sustained, and claiming damages therefor, the person receiving such notice, or some person in his behalf, notifies in writing the person injured, his executor or administrator, or the person giving or serving such notice in his behalf, that his notice is insufficient, and requests forthwith a written notice in compliance with law. If the person authorized to give such notice, within five days after the receipt of such request, gives a written notice complying with the law as to the time, place, and cause of the injury or damage, such notice shall have the effect of the original notice, and shall be considered a part thereof. See Acts Mass. 1894, c. 389.

The Massachusetts statutes providing for the recovery of damages for injuries suffered upon highways are substantially similar in regard to notice.

Rev. Laws Mass. c. 51, § 20 (Pub. St. c. 52, § 19, as amended by Acts 1882, c. 36, Acts 1888, c. 114, and Acts 1894, c. 422): "A person so injured shall, within ten days thereafter, if such defect or want of repair is caused by or consists in part of snow or ice, or both, and in all other cases within thirty days thereafter, give to the county, city, town, or person by law obliged to keep said way, causeway, or bridge in repair, notice of the time, place, and cause of the said injury or damage. * * * Such notice shall not be invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of the injury, if it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby."

Rev. Laws Mass. c. 51, § 21 (Pub. St. c. 52, § 21): "Such notice shall be in writing, signed by the person injured, or by some one
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defect in the highway. The purpose of the notice is to aid the defendant in investigating the question of his liability by seasonably apprising him of the negligence,⁴ and to guard somewhat against the bringing of groundless suits.

"In statutes like that under which two counts of this action were brought, the requirement of notice is held to make a condition precedent to the right to bring an action, not on a nice interpretation of the particular words used, but upon a general view of what the legislature would be likely to intend."⁵ As the statute giving

in his behalf, and may be given, in the case of a county, to one of the county commissioners, or the county treasurer; in the case of a city, to the mayor, the city clerk, or treasurer; and in the case of a town, to one of the selectmen, or to the town clerk or treasurer. If, by reason of physical or mental incapacity, it is impossible for the person injured to give the notice within the time required, he may give it within ten days after such incapacity has been removed, and, in case of his death without having been for ten days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give the notice within thirty days after his appointment."

³ Sess. Laws Colo. 1893, c. 77, § 2; Mills' Ann. St. 1891-96, § 1511b. "No action for the recovery of compensation for injury or death under this act shall be maintained unless written notice of the time, place, and cause of the injury is given to the employer within sixty days, and the action is commenced within two years from the occurrence of the accident causing the injury or death. But no notice given under the provisions of this section shall be deemed invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of injury: provided, it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby." See, also, highway statute, Laws Colo. 1899, c. 145.

⁴ Spellman v. Inhabitants of Chicopee, 131 Mass. 443; Miller v. City of Springfield, 177 Mass. 373.

⁵ Veginan v. Morse, 160 Mass. 143, 146; Keen v. Millwall Dock

the action has required a notice of the injury, the terms of the act must be followed, and a plaintiff cannot excuse his failure to give the notice by evidence that the defendant had waived it,⁶ or that the defendant or his agents already knew of the circumstances of the accident either by verbal communication from the plaintiff or through other sources.⁷ Unless the act itself prescribes what shall be an excuse for want of notice, the failure to give the notice will be an absolute bar to the action.⁸

The Massachusetts and Colorado acts require the notice to be in writing. There is no such provision in the English act, but it has been held that sections 4 and 7 of that act must be read and construed together, and that the requisites that they mention could be contained only in a written notice. In England, therefore, the notice must be written.⁹ A verbal communication made to the employer, although made within the time and stating the necessary facts, is not a compliance with the act, and is of no avail to the plaintiff.

Co., 8 Q. B. Div. 482. See, also, *Gay v. City of Cambridge*, 128 Mass. 387.

⁶ *Gay v. City of Cambridge*, 128 Mass. 387; *Macey v. Hodson* (Dec. 24, 1881) 72 Law T. 140.

⁷ *Keen v. Millwall Dock Co.*, 8 Q. B. Div. 482; *Adams v. Nightingale* (Dec. 24, 1881) 72 Law T. 139, (April 15, 1882) 72 Law T. 424. See, also *Kenady v. City of Lawrence*, 128 Mass. 318; *Miles v. City of Lynn*, 130 Mass. 398; *Dalton v. City of Salem*, 139 Mass. 91. But the defendant's knowledge is material evidence upon the question whether the notice was intended to mislead, or in fact misled him. *Infra*, § 29.

⁸ *Moyle v. Jenkins*, 8 Q. B. Div. 116. In case of death, the English act provides that, if there is a "reasonable excuse," the want of a notice will not be a bar.

⁹ *Moyle v. Jenkins*, 8 Q. B. Div. 116.

There seems to be no objection to the view that a notice may be contained in separate papers, provided that they so refer to each other as to be taken together. The *dicta* sustain this proposition, although it is not the subject of express decision. "I agree that, as a general rule, the notice must be given in one notice, but I am not prepared to say that it would be fatal if it were contained in more than one notice. Suppose, for example, a person in his letter written on one day should describe fully the injury he had sustained, but should leave out his address, and he should the next day send a letter stating that 'in the letter I wrote yesterday I omitted to give you my address, and I now give it.' If both these letters were written in time, and both served on the employer, I am not prepared to say that the last might not be taken to incorporate the first; and therefore, though not an accurate but an informal notice, it might be considered a notice within the meaning of the statute." "If the letter of the solicitor in this case had referred in terms to the inspector's report, I should have asked then that this case might be further discussed. But inasmuch as here there is no distinct reference to any written document at all, and only an allusion to particulars having been communicated, I cannot say that there is a notice in writing on behalf of or by the injured person, within the terms of this section."¹⁰ Thus, a notice, itself defective, cannot be cured by reference to a prior verbal communication, and it

¹⁰ *Keen v. Millwall Dock Co.*, 8 Q. B. Div. 482, 485, 46 Law T. (N. S.) 473, 51 Law J. Q. B. 279, 30 Wkly. Rep. 503; *Driscoll v. City of Fall River*, 163 Mass. 105. See *Lamley v. Mayor, etc., of East Retford*, 55 J. P. 133; *Carter v. Drysdale*, 12 Q. B. Div. 91.

would seem that, where several papers must be relied upon, they should all be in writing, and served upon the employer within the time limited.

The notice is not to be strictly construed. "It is to be written in 'ordinary language'; that is, the party is to use his own untutored language."¹¹ "The notices required by the statute are not to be construed with technical strictness, but enough should appear in them to show that they are intended as the basis of a claim."¹²

Although the notice is given as a basis of a claim, it need not in terms claim compensation for the injury, since that is not one of the statements which the act requires it to contain.¹³

§ 28. "Time, place, and cause."

The notice must state with substantial accuracy the time, place, and cause of the injury.

The English act requires the notice to "state in ordinary language the cause of the injury and the date at which it was sustained." The name and address of the plaintiff must also be given. The Massachusetts act has adopted the phraseology of the earlier highway statute, and requires "notice of the time, place, and cause

¹¹ *Stone v. Hyde*, 9 Q. B. Div. 76, 79.

¹² *Driscoll v. City of Fall River*, 163 Mass. 105, 108; *Daly v. New Jersey S. & I. Co.*, 155 Mass. 1; *Hughes v. City of Lawrence*, 160 Mass. 474; *Clarkson v. Musgrave*, 9 Q. B. Div. 386; *Thomson v. Robertson*, 12 Rettie, Ct. Sess. Cas. (4th Ser.) 121.

¹³ *Kenady v. City of Lawrence*, 128 Mass. 318; *Taylor v. Inhabitants of Woburn*, 130 Mass. 494; *Savory v. Haverhill*, 132 Mass. 324; *Lyman v. County of Hampshire*, 138 Mass. 74; *Driscoll v. City of Fall River*, 163 Mass. 105.

of the injury" to be given. The same words are found in the Colorado act.

It has already been noted that these statements do not need to be in technical language or in any set form; the notice need not be drafted with the care of a declaration or with a view of setting out a good cause of action.¹⁴ "The object of the notice is to direct attention with substantial accuracy, not with unerring precision, to the place where an accident has happened."¹⁵ It is enough if the notice sets out these requisites with such fullness that the defendant is able upon investigation to discover the place and the defect.¹⁶ Since the passage of the amendment to the highway statute in 1882, providing that a notice shall not be invalid by reason of inaccuracy if the inaccuracy was not intended to mislead, and the defendant was not in fact misled,—a provision that is incorporated in the acts of Massachusetts and England,—a lesser degree of accuracy is required.¹⁷

Time.

The time is sufficiently stated when the date of the accident is set forth. It is not necessary that the division or hour of the day be given.¹⁸ Under the first

¹⁴ *Canterbury v. City of Boston*, 141 Mass. 215, 218; *Clarkson v. Musgrave*, 9 Q. B. Div. 386; *supra*, § 27.

¹⁵ *Hughes v. City of Lawrence*, 160 Mass. 474, 482.

¹⁶ *Sargent v. City of Lynn*, 138 Mass. 599; *Lyman v. County of Hampshire*, 138 Mass. 74; *Lowe v. Inhabitants of Clinton*, 133 Mass. 526.

¹⁷ *Infra*, § 29.

¹⁸ *Larkin v. City of Boston*, 128 Mass. 521; *Donnelly v. City of Fall River*, 132 Mass. 299; *Savory v. City of Haverhill*, 132 Mass. 324;

highway statute a statement that the accident happened on "Christmas morning" was held good.¹⁹

Place.

An entire omission to state the place rendered the notice fatally defective, but by the Massachusetts statute of 1894, c. 389, this cannot be taken advantage of by the defendant unless he has given the plaintiff an opportunity to amend his notice in this regard.²⁰ Under the earlier highway acts the description of the place was not sufficient if it applied equally well to two or more places,²¹ although, if the notice was ambiguous, it could be shown that an agent of the defendant was told the exact spot, and the inaccuracy thereby cured.²² Since the purpose of the notice is merely to aid the defendant in locating the place of the accident, a lesser degree of certainty is required when the defect is permanent or obvious than when it is a temporary or transient condition.²³

Welch v. Inhabitants of Gardner, 133 Mass. 529; Aston v. City of Newton, 134 Mass. 507; Cronin v. City of Boston, 135 Mass. 110; Lyman v. County of Hampshire, 138 Mass. 74; Donahoe v. Old Colony R. Co., 153 Mass. 356; Drommie v. Hogan, 153 Mass. 29.

¹⁹ Taylor v. Inhabitants of Woburn, 130 Mass. 494.

²⁰ Gardner v. Inhabitants of Weymouth, 155 Mass. 595; *infra*, § 29.

²¹ Dalton v. City of Salem, 139 Mass. 91.

²² Veno v. City of Waltham, 158 Mass. 279; Norwood v. City of Somerville, 159 Mass. 105.

²³ Spellman v. Inhabitants of Chicopee, 131 Mass. 443; Cronin v. City of Boston, 135 Mass. 110. For sufficient descriptions, see Larkin v. City of Boston, 128 Mass. 521; Savory v. City of Haverhill, 132 Mass. 324; Welch v. Inhabitants of Gardner, 133 Mass. 529; McCabe v. City of Cambridge, 134 Mass. 484; Aston v. City of Newton, 134 Mass. 507; Pendergast v. Inhabitants of Clinton, 147 Mass. 402; Richardson v. City of Boston, 156 Mass. 145; Young v. Inhabitants of
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Cause.

Subject to the statutes above noted in regard to the inaccuracy of the statements, the notice must give the cause of the injury;²⁴ and this requirement is not fulfilled by a statement that the accident happened "in consequence of certain defective arrangements," or by reason of a "defective condition."²⁵ The notice must show in what the negligence or defect consisted,—the facts that caused the injury; but it need not give "the cause of that cause," or point out the specific act of negligence or name the person who was negligent.²⁶ Thus, the following statements of the cause have been considered sufficient: "By reason of a defective and insufficient staging, and the fall of the staging;"²⁷ "by a stone being precipitated upon him from your derrick as a result of your negligence and of the negligence

Douglas, 157 Mass. 383; *Conners v. City of Lowell*, 158 Mass. 336; *Hughes v. City of Lawrence*, 160 Mass. 474; *Coffin v. Inhabitants of Palmer*, 162 Mass. 192. For insufficient descriptions, see *Donnelly v. City of Fall River*, 130 Mass. 115; *Miles v. City of Lynn*, 130 Mass. 398; *Post v. Inhabitants of Foxborough*, 131 Mass. 202; *Shea v. City of Lowell*, 132 Mass. 187; *Shallow v. City of Salem*, 136 Mass. 136; *Miller v. City of Springfield*, 177 Mass. 373.

²⁴ *McNulty v. City of Cambridge*, 130 Mass. 275.

²⁵ *Hunter v. Dickinson* (March 25, 1882) 72 Law T. 373. See, also, *Larkin v. City of Boston*, 128 Mass. 521; *Noonan v. City of Lawrence*, 130 Mass. 161; *Miles v. City of Lynn*, 130 Mass. 398; *Madden v. City of Springfield*, 131 Mass. 441; *Dickie v. Boston & A. R. Co.*, 131 Mass. 516; *Dalton v. City of Salem*, 131 Mass. 551; *Shea v. City of Lowell*, 132 Mass. 187; *Roberts v. Inhabitants of Douglas*, 140 Mass. 129.

²⁶ *Lynch v. Allyn*, 160 Mass. 248; *Beauregard v. Webb Granite & C. Co.*, 160 Mass. 201; *Brick v. Bosworth*, 162 Mass. 334. See, also, *Whitman v. Inhabitants of Groveland*, 131 Mass. 553.

²⁷ *Drommie v. Hogan*, 153 Mass. 29.

of some person for whose negligence you are liable;"²⁸ "the falling of a bank of earth;"²⁹ "the falling of a derrick upon him on account of the same being improperly or insecurely fastened."³⁰

Cases arising under the highway statute, and relating to the sufficiency of the statement of cause, are collected below.³¹

§ 29. Inaccuracy.

A defect or inaccuracy in the notice does not invalidate it, if such defect or inaccuracy was not for the purpose of misleading the defendant, or if in fact he was not misled thereby.

Massachusetts.

The Massachusetts act contains the provision, "but no notice given under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or

²⁸ *Beauregard v. Webb Granite & C. Co.*, 160 Mass. 201.

²⁹ *Lynch v. Allyn*, 160 Mass. 248.

³⁰ *Brick v. Bosworth*, 162 Mass. 334. See, also, *Donahoe v. Old Colony R. Co.*, 153 Mass. 356; *Franks v. Silver & Co.* (May 27, 1882) 73 Law T. 69. Different causes may be stated. *Coughlan v. City of Cambridge*, 166 Mass. 268.

³¹ Sufficient statement of cause: *Taylor v. Inhabitants of Woburn*, 130 Mass. 494; *Spellman v. Inhabitants of Chicopee*, 131 Mass. 443; *Savory v. City of Haverhill*, 132 Mass. 324; *Bailey v. Inhabitants of Everett*, 132 Mass. 441; *Welch v. Inhabitants of Gardner*, 133 Mass. 529; *McCabe v. City of Cambridge*, 134 Mass. 484; *Aston v. City of Newton*, 134 Mass. 507; *Dalton v. City of Salem*, 136 Mass. 278; *Grogan v. City of Worcester*, 140 Mass. 227; *Davis v. Inhabitants of Charlton*, 140 Mass. 422; *Canterbury v. City of Boston*, 141 Mass. 215; *Richardson v. City of Boston*, 156 Mass. 145. Insufficient statement: *Cronin v. City of Boston*, 135 Mass. 110; *Lyon v. City of Cambridge*, 136 Mass. 419; *Fortin v. Inhabitants of Easthampton*, 142 Mass. 486; *Miller v. City of Springfield*, 177 Mass. 373.

cause of the injury: provided it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby." These words were first used in Act 1882, c. 36, which amended the previous statute relating to notices in cases of injury from defects in the highway.³² "This amendment does not relieve a plaintiff of the necessity of giving a notice, nor of stating in his notice each of the three facts called for by the statute, namely, the time, place, and cause of the injury. It purports to relieve only from the effect of an inaccuracy in stating either of these, where there was no intention to mislead the defendant, and where the defendant was not in fact misled. Construing it strictly, it seems to contemplate a case where the notice would be sufficient as to the required elements, were it not for an inaccuracy in the statement that is liable to mislead. Before the passage of this statute, it was held that a notice, to be good, must be sufficiently full and accurate in stating each of the required particulars to furnish substantial aid to the defendant in the investigation of the claim, and to enable the authorities to ascertain with reasonable certainty on what it was founded. * * * We think it would be too strict a construction to hold that the amendment applies only to cases of misstatement, for an incomplete and imperfect statement which is not false may be termed inaccurate, and may sometimes mislead. Yet the amendment can have no application where there is no statement at all; and this is true,

³² *Supra*, § 27, note 2. This amendment did not cure an inaccuracy in a notice given before it went into effect. *Shallow v. City of Salem*, 136 Mass. 136.

whether the omission to make a statement relates to only one of the required particulars, or to all of them. Since the passage of the amendatory statute, as well as before, there must be, in regard to each particular, a statement such as would, if correct, be of substantial assistance to the authorities in the investigation of the claim. This is a condition precedent to the maintenance of the suit. If there is a statement of the kind required which as to the time or the place or the cause of the injury is inaccurate, whether from falsity or deficiency, whether through omission or error, the plaintiff may still recover if there was no intention to mislead, and if the inaccuracy did not in fact mislead. In the present case the notice contains no statement of the place of the injury, even if it could be held that there is a statement of the cause of it. All that appears is that the accident happened on some sidewalk where there was a hydrant; but this is not enough. For this reason, the notice is fatally defective, and it cannot properly be said that there was an inaccuracy in stating the place, so as to make the amendment applicable, when there was no statement of it, nor any attempt to state it.”³³

A notice under the Massachusetts act, to be good, therefore, must contain a statement of the time, of the place, and of the cause, and if one of these is omitted it is fatally defective, entirely apart from the question whether there was an intention to mislead the defendant or whether he was in fact misled. But “a very slight suggestion of the cause will be sufficient when

³³ *Gardner v. Inhabitants of Weymouth*, 155 Mass. 595, 596. See *Fortin v. Inhabitants of Easthampton*, 142 Mass. 486.

the conditions of the statute are complied with;"³⁴ and if an attempt to state one of the requisites can be found in the notice it will be held good, if there were no intention to mislead, or if the defendant was not in fact misled. Thus, this statement of cause, "thrown from her carriage, caused by a defect in the road," has been held to be an inaccuracy, against which the proviso of the statute relieves.³⁵

In order to come within the provisions of the clause of the act relative to inaccuracies in the notice, the plaintiff must show that he did not intend to mislead the defendant, and that the defendant was not in fact misled. The burden of proof is on the plaintiff to establish both of these propositions, but the fact "may often be inferred from the circumstances, without testimony directly to the point. But in the present case the notice was of a kind which would have a direct tendency to mislead, and there was no evidence tending to show that the authorities were not misled by it, or that, as set out in the bill of exceptions, they 'ever, until the time of trial, had a different account of the accident from the one given in the notice.' Such a notice, and such an investigation as the authorities would naturally make on account of it, would be likely to lead them to rest their defense on the legal proposition that

³⁴ *Fortin v. Inhabitants of Easthampton*, 142 Mass. 486.

³⁵ *Carberry v. Inhabitants of Sharon*, 166 Mass. 32. For examples of inaccuracies, see *Canterbury v. City of Boston*, 141 Mass. 215; *Liffin v. Inhabitants of Beverly*, 145 Mass. 549; *Bowes v. City of Boston*, 155 Mass. 344; *Veno v. City of Waltham*, 158 Mass. 279; *Connors v. City of Lowell*, 158 Mass. 336; *Hughes v. City of Lawrence*, 160 Mass. 474; *Fuller v. Inhabitants of Hyde Park*, 162 Mass. 51. For rulings under the English act, see *infra*, notes 44-46.

cities are not liable for accidents caused by the fright of horses from objects of a grotesque or unusual appearance in the street. * * * A misstatement is more likely to mislead than no statement at all. We are of opinion that there was no evidence on which the jury could find that the notice was sufficient to enable the plaintiff to recover for an injury caused by a collision with a pile of stones."³⁶ Where the notice itself has no tendency to mislead, the jury may find that the plaintiff did not intend to mislead the defendant, and that the latter was not in fact misled thereby.³⁷ On the issue whether the defendant was in fact misled, evidence is admissible that the defendant was at the scene of the accident, helped remove the injured person, and saw the condition of the premises,³⁸ or that he or his agents were told the circumstances of the accident by the plaintiff, or knew of it through other sources.³⁹

Whether or not the notice is sufficient is a question of law for the court;⁴⁰ but the questions whether the plaintiff intended to mislead or whether the defendant was misled are to be determined by the jury.⁴¹

³⁶ *Bowes v. City of Boston*, 155 Mass. 344, 349; *infra*, § 33; *Miller v. City of Springfield*, 177 Mass. 373.

³⁷ *Connors v. City of Lowell*, 158 Mass. 336. See, also, *Whitman v. Inhabitants of Groveland*, 131 Mass. 553; *McCabe v. City of Cambridge*, 134 Mass. 484; *Shallow v. City of Salem*, 136 Mass. 136; *Sargent v. City of Lynn*, 138 Mass. 599; *Canterbury v. City of Boston*, 141 Mass. 215; *Dolan v. Alley*, 153 Mass. 380.

³⁸ *Drommie v. Hogan*, 153 Mass. 29.

³⁹ *Fortin v. Inhabitants of Easthampton*, 142 Mass. 486; *Veno v. City of Waltham*, 158 Mass. 279; *Norwood v. City of Somerville*, 159 Mass. 105.

⁴⁰ *Shea v. City of Lowell*, 132 Mass. 187.

⁴¹ *Liffin v. Inhabitants of Beverly*, 145 Mass. 549; *Carter v. Drysdale*, 12 Q. B. Div. 91.

A recent statute in Massachusetts⁴² relating to notices in cases of injury, and applicable to notices under the highway statutes and under the act, has practically removed any defense which the defendant might formerly have urged with reference to omissions or inaccuracies in the statements of time, place, or cause. By this statute a defendant cannot take the objection that the notice omits to state the time, place, or cause, unless within five days after the receipt of the notice he de-

⁴² Rev. Laws Mass. c. 106, § 75: "A notice given under the provisions of this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place, or cause of the injury, if it is shown that there was no intention to mislead, and that the employer was not in fact misled thereby. The provisions of section twenty-two of chapter fifty-one shall apply to notices under the provisions of this section."

The section referred to is as follows (Rev. Laws Mass. c. 51, § 22): "A defendant shall not avail himself in defense of any omission to state in such notice the time, place, or cause of the injury or damage, unless, within five days after receipt of a notice, given within the time required by law, and by an authorized person, referring to the injuries sustained, and claiming damages therefor, the person receiving such notice, or some person in his behalf, notifies in writing the person injured, his executor or administrator, or the person giving or serving such notice in his behalf, that his notice is insufficient, and requests forthwith a written notice in compliance with law. If the person authorized to give such notice, within five days after the receipt of such request, gives a written notice complying with the law as to the time, place, and cause of the injury or damage, such notice shall have the effect of the original notice, and shall be considered a part thereof."

This is a re-enactment of the earlier statute,—Acts Mass. 1894, c. 389. Where plaintiff omits to give amended notice within the five days, but sends a second notice within thirty days, this second notice is "none the worse that the plaintiff has given an insufficient one before. *McLean v. City of Boston*, 180 Mass. 6.

mands of the person giving it a further notice, and that person neglects for more than five days to furnish it.

The inaccuracies covered by these Massachusetts acts are those occurring in the statements of time, place, and cause. The act does not relieve against a defect in giving a notice, either on the part of the person giving or the person receiving it.⁴³

England.

The English act provides that "a notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defense by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

An early case held that a statement of the cause of the injury in these words, "in consequence of certain defective arrangements," was equivalent to an omission to state any cause, and that therefore the notice did not come within the proviso.⁴⁴ But this ruling has been denied, and it is held that a complete omission to state any cause,⁴⁵ or an omission to give the date,⁴⁶ is a defect or inaccuracy which does not render the notice invalid if the defense was not prejudiced, or there was no intention to mislead.

⁴³ *Harding v. Lynn & B. R. Co.*, 172 Mass. 415.

⁴⁴ *Hunter v. Dickinson* (March 25, 1882) 72 Law T. 373.

⁴⁵ *Stone v. Hyde*, 9 Q. B. Div. 76; 46 Law T. (N. S.) 421, 51 Law J. Q. B. 452.

⁴⁶ *Carter v. Drysdale*, 12 Q. B. Div. 91. See, also, *Thomson v. Robertson*, 12 Rettle, Ct. Sess. Cas. (4th Ser.) 121, 22 Scot. Law R. 97.

In order to come within the proviso, the plaintiff must show both that the defense was not prejudiced by the defect or inaccuracy, and that such defect or inaccuracy was not for the purpose of misleading. The English rule seems to differ from that established in Massachusetts, in that the court must in every case require some evidence on both of these propositions where a notice is shown to be defective, and cannot find these facts from the statements contained in the notice itself.⁴⁷

§ 30. Time for giving notice.

The notice must be both sent and received within the time limited by the act.

Under the English act, the notice must be given "within six weeks," and under the Massachusetts and Colorado acts "within sixty days," after the occurrence of the accident.⁴⁸ The notice must be both sent and received within the time limited; and thus, where the injury happened in Scotland on May 7th, and a notice was sent which in course of post could not be received until June 19th, it was held that proper notice had not been given, since the 18th was the last day of the six weeks;⁴⁹ and in computing time the day upon which the accident happened is to be excluded.⁵⁰

Bringing an action does not do away with the necessity of notice, although the action is begun within the

⁴⁷ *Stone v. Hyde*, 9 Q. B. Div. 76, 51 Law J. Q. B. 452.

⁴⁸ *Supra*, § 27.

⁴⁹ *McDonagh v. MacLellan*, 13 Rettle, Ct. Sess. Cas. (4th Ser.) 1000.

⁵⁰ *Bemis v. Leonard*, 118 Mass. 502.

time limited for giving the notice.⁵¹ And if the notice is not served until after the writ is made, although the notice is given to the defendant on the same day on which the writ is served, a suit cannot be maintained under the act.⁵² Evidence to show when the notice was given and received is admissible.⁵³

Disability of plaintiff.

The Massachusetts act contains a provision whereby, "if from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in said section, he may give the same within ten days after such incapacity is removed, and in case of his death without having given the notice, and without having been for ten days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give such notice within sixty days after his appointment."⁵⁴

To avail himself of this extension of time, the plaintiff must show his physical and mental incapacity to give the notice,⁵⁵ and when the evidence upon this point is conflicting the jury are to pass upon it.⁵⁶ "It has repeatedly been held that a plaintiff cannot take advantage of this last provision of the statute if his physical and mental capacity would enable him to procure

⁵¹ *Foley v. Pettee Machine Works*, 149 Mass. 294.

⁵² *Veginan v. Morse*, 160 Mass. 143.

⁵³ *Hayes v. Inhabitants of Hyde Park*, 153 Mass. 514.

⁵⁴ *Supra*, § 27, note 2.

⁵⁵ *Mitchell v. City of Worcester*, 129 Mass. 525; *May v. City of Boston*, 150 Mass. 517; *Ledwidge v. Hathaway*, 170 Mass. 348.

⁵⁶ *Weich v. Inhabitants of Gardner*, 133 Mass. 529; *Saunders v. City of Boston*, 167 Mass. 595.

another person to give the notice in his behalf, even though he could not give it personally.”⁵⁷ It must therefore appear that he was both physically and mentally disabled,⁵⁸ and this fact is not shown by evidence that he was confined in bed at home or at a hospital and conscious most of the time;⁵⁹ but if it appears that he was often delirious, with few moments in which he could attend to business, there is evidence to be submitted to the jury.⁶⁰

When death results from the injury, and the personal representative is the proper person to give the notice, it must be given to the employer within sixty days from the date of the appointment of the executor or administrator.⁶¹

The acts of England and Colorado do not provide for any extension of time because of the inability of the servant to give notice, and therefore, unless notice is given on his behalf during the period limited in those statutes, he is without remedy under the act.

§ 31. Person to give notice.

The notice must be given by the injured servant or by some one in his behalf.

In case of his death his personal representative may give the notice.

⁵⁷ *Saunders v. City of Boston*, 167 Mass. 595.

⁵⁸ *Cogan v. Burnham*, 175 Mass. 391.

⁵⁹ *McNulty v. City of Cambridge*, 130 Mass. 275; *Lyons v. City of Cambridge*, 132 Mass. 534; *May v. City of Boston*, 150 Mass. 517; *Saunders v. City of Boston*, 167 Mass. 595; *Ledwidge v. Hathaway*, 170 Mass. 348.

⁶⁰ *Welch v. Inhabitants of Gardner*, 133 Mass. 529; *Barclay v. City of Boston*, 167 Mass. 596, 173 Mass. 311.

⁶¹ *Infra*, § 31.

Under the Massachusetts act, the notice must be "signed by the person injured, or by some one in his behalf." The Colorado act omits this provision, and the English act requires the name and address of the person injured to be given, but does not require the notice to be signed.⁶² There is no doubt but what a person other than the injured employe may give the notice required by the act, provided that he gives it upon the plaintiff's behalf.

The paper given must purport to be a notice, and intended as a basis of a claim on the part of the plaintiff.⁶³ A signature by another hand in the presence of the plaintiff is sufficient under the act.⁶⁴ When the notice is given by another in behalf of the plaintiff," it is not necessary that the notice should say in express terms that it is signed in behalf of the plaintiff, if that can be gathered from its terms." Thus, where a husband signed a notice personally, which contained the statement, "We will be obliged to make a claim," or where it stated, "I hereby give notice that I shall hold the town responsible for serious injury sustained by my wife," it was held that enough appeared to show that the husband gave the notice in behalf of his wife.⁶⁵ A minor must give a notice, and it may be signed by his father.⁶⁶

⁶² *Supra*, § 27; *Keen v. Millwall Dock Co.*, 8 Q. B. Div. 482.

⁶³ *Driscoll v. City of Fall River*, 163 Mass. 105.

⁶⁴ *Finnegan v. Lucy*, 157 Mass. 439.

⁶⁵ *Carberry v. Inhabitants of Sharon*, 166 Mass. 32; *Higgins v. Inhabitants of North Andover*, 168 Mass. 251.

⁶⁶ *Taylor v. Inhabitants of Woburn*, 130 Mass. 494; *Madden v. City of Springfield*, 131 Mass. 441.

An attorney may give a notice in behalf of his client, and "S., by W., his Attorney," is a sufficient signature. "Where a notice is given purporting to be for the person injured by an attorney at law, and especially by one who afterwards represents the plaintiff in his action, if express authority to give the notice is necessary,—respecting which, see *Taylor v. Inhabitants of Woburn*, 130 Mass. 494, and *Roberts & Wallace, Employers' Liability* (3d Ed.) 317 et seq., 481,—it may be presumed that he had it, in the absence of anything to show the contrary. His declaration that he had authority, or his assumption of authority, is *prima facie* sufficient." ⁶⁷

In case of death.

The Colorado act does not state who shall give notice if the injury results in death, and the only provision in the English act is "that, in case of death, the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice." ⁶⁸ Where the death occurs, and the representative is appointed before the expiration of the time limited for giving the notice, the representative may come within the terms of the act. But if the death happens after the sixty days or the six weeks limited in these statutes, and the servant had not given a notice within that time, it is not entirely clear that the representatives are in such case entitled to give notice and to sue under the act. Both acts provide for action by the personal rep-

⁶⁷ *Steffe v. Old Colony R. Co.*, 156 Mass. 262; *Dolan v. Alley*, 153 Mass. 380.

⁶⁸ *Supra*, § 27.

representatives in case of death, and it might be considered that the provision as to notice applied to such persons as were entitled to sue, and that a representative might have the specified time after his appointment in which to give the notice.⁶⁹ This would apply more strongly under the Colorado act than under the English statute, since by the latter it is provided that in case of death the want of notice shall not be a bar if there is a reasonable excuse. Death cannot be considered a reasonable excuse, because it is upon this contingency that the provision relative to failure to give notice is founded. It has been held that the fact that the defendant three times promised to make compensation was not a reasonable excuse for failure to give the notice.⁷⁰

This difficulty has been provided for in the Massachusetts act, under which an executor or administrator may give notice within sixty days after his appointment. If the employe is instantly killed, or dies without conscious suffering, his widow or dependent next of kin, being the proper parties to sue, may give the notice within sixty days from the occurrence of the accident.⁷¹ But in such a case the personal representative also may give the notice. "It seems to us more consistent with the probable intention of the legislature to hold also, * * * in the contingencies expressly mentioned in the statute, notice may also be given by an executor or administrator. The difficulty of reach-

⁶⁹ Connor v. Simpson (Nov. 22, 1884) 78 Law T. 64. See Daly v. New Jersey S. & I. Co., 155 Mass. 1.

⁷⁰ Macey v. Hodson (Dec. 24, 1881) 72 Law T. 140.

⁷¹ Gustafsen v. Washburn & M. Mfg. Co., 153 Mass. 468.

ing this conclusion logically was pointed out in Gustafsen's Case. But the statute was designed to extend the liability of employers for personal injuries suffered by employes in their service, and the requirements as to notice should receive a liberal construction."⁷² When the employe is not instantly killed, but dies after a period of conscious suffering, the personal representative, being the only person entitled to sue, is the proper one to give the notice.

If the servant dies without having given the notice, and without being for ten days at any time of sufficient capacity to give it, his executor or administrator may give the notice within sixty days after his appointment. To entitle the personal representative to bring suit under the act and to give notice, it must appear that his intestate was not of capacity to give the notice for more than ten days during his life. If the deceased lived more than ten days in a condition in which it was possible for him to have given the notice, his executor or administrator cannot give it.⁷³

§ 32. To whom and how notice is to be given.

Notice is to be given to the employer or his duly-authorized agent by the plaintiff within the period limited.

The notice need not be served in any prescribed way.

Under the English act there are elaborate provisions relating to the service of the notice. It may be done by delivery, or by sending a registered letter, or, when

⁷² *Daly v. New Jersey S. & I. Co.*, 155 Mass. 1, 4; *Jones v. Boston & A. R. Co.*, 157 Mass. 51.

⁷³ *Nash v. Inhabitants of South Hadley*, 145 Mass. 105; *Barclay v. City of Boston*, 173 Mass. 311.

the employer is a corporation, by delivering or mailing it to the office of the company. When the service is made by letter, the notice is considered served when the letter would in the ordinary course of post reach its destination.⁷⁴

The Massachusetts and Colorado acts do not prescribe any method of service. "Without reference to the modes of service prescribed by the law in ordinary cases when notice is to given, it is enough under this statute if a notice in proper form from the employe comes into the hands of the employer within [sixty] days after the accident."⁷⁵ Thus, where the notice was taken to the office of the defendant's superintendent, and inquiry made for him, and in his absence the notice was left with a man in the office whose dress and manner indicated that he was a clerk, there was evidence that the notice was duly served.⁷⁶ So, where a notice is delivered to the assistant clerk of the city in the absence of the clerk;⁷⁷ where the notice was given to an alderman with a request that he deliver it to the proper authorities, and he gave it, at a meeting of the board, to the city clerk.⁷⁸

The notice may be served by an attested copy by a

⁷⁴ *Supra*, § 27, note 1.

⁷⁵ *Shea v. New York, N. H. & H. R. Co.*, 173 Mass. 177, 179. Service of a notice of injury upon the commissioner of corporations, under Acts Mass. 1884, c. 330, is probably not an effectual service upon the defendant without evidence that the notice was in fact received by the defendant within the time. Such a notice does not come within the meaning of the word "process."

⁷⁶ *Shea v. New York, N. H. & H. R. Co.*, 173 Mass. 177.

⁷⁷ *McCabe v. City of Cambridge*, 134 Mass. 484.

⁷⁸ *Wormwood v. City of Waltham*, 144 Mass. 184.

constable,⁷⁹ may be personally delivered, or sent by post. The only care to be taken is that there may be evidence that the notice was in fact received,⁸⁰ and when the post is used it is safer to register the letter.

The notice must be addressed to and received by the employer; but if it is sent to his residence or place of business it will be presumed that he received it, in absence of proof to the contrary. The managing agent or general superintendent has authority to receive the notice.⁸¹ In England it has been held that although the letter was wrongly addressed, yet, if it came into the hands of the proper party, that this was a defect or inaccuracy which could be cured under the provisions of the act.⁸² Such a case is not covered by the Massachusetts act, and accordingly, where the plaintiff was injured while in the employment of the East Middlesex Railroad, and a notice was directed to the East Middlesex Railroad, and served upon its president, B., and it appeared that this railroad had been leased to the defendant company, of which B. was also president, it was held that the notice was properly excluded in an action against the latter company.⁸³ When a notice

⁷⁹ *Whitney v. City of Lowell*, 151 Mass. 212.

⁸⁰ *Adams v. Nightingale* (Dec. 24, 1881) 72 Law T. 139, (April 15, 1882) 72 Law T. 424. See, also, *Warren v. Warren*, 1 Crompt., M. & R. 250; *Cowler v. Moresby Coal Co.* (July 4, 1885) 79 Law T. 176; *McGoran v. Tancred*, 13 Rettie, Ct. Sess. Cas. (4th Ser.) 1033.

⁸¹ *Shea v. New York, N. H. & H. R. Co.*, 173 Mass. 177; *Cowler v. Moresby Coal Co.* (July 4, 1885) 79 Law T. 176. Where freight agent had been accustomed to receive notice, and in obedience to printed instructions he forwarded this to defendant's attorney, held good. *De Forge v. New York, N. H. & H. R. Co.*, 178 Mass. 59.

⁸² *Dunn v. Butler*, 1 Times Law R. 476.

⁸³ *Harding v. Lynn & B. R. Co.*, 172 Mass. 415.

is served upon an agent, it must therefore be given him in his capacity of agent for the defendant, and, if he receives or has knowledge of it in a different capacity, the notice is ineffectual.

When the defendant is a city or town, the highway statutes have designated the proper person on whom service may be made. A notice addressed to "A., treasurer of a county," or "city clerk," is a notice to the county or city, and not to A. personally.⁸⁴

§ 33. Effect of notice.

The giving of notice must be alleged in the declaration, and upon the trial the plaintiff is concluded by the statements contained in his notice.

The giving of notice is a condition precedent to a suit under the act, and the declaration must accordingly contain the allegation that notice of the time, place, and cause of the accident was given by the plaintiff to the defendant. An allegation that such notice was duly given is good upon demurrer.⁸⁵ If the count, although framed in the words of the statute, omits to state that notice was given, it would seem that if it states a cause of action at common law it would be good upon demurrer.⁸⁶

The purpose of a notice is to give the defendant an early opportunity to investigate the question of his liability for the injury, while the conditions remain sub-

⁸⁴ *Lyman v. County of Hampshire*, 138 Mass. 74; *Leonard v. City of Holyoke*, 138 Mass. 78.

⁸⁵ *Dickie v. Boston & A. R. Co.*, 131 Mass. 516; *Steffe v. Old Colony R. Co.*, 156 Mass. 262; *infra*, § 125.

⁸⁶ *Ryalls v. Mechanics' Mills*, 150 Mass. 190; *Colorado M. & E. Co. v. Mitchell*, 26 Colo. 284.

stantially the same and the means of investigation are at hand. The notice itself is not a part of the pleadings, and it need not state with technical accuracy a cause of action. It is, however, information to the defendant of an injury caused by his negligence in some regard, and in the absence of knowledge by the defendant he has a right to rely upon the plaintiff's story of how the accident occurred. The statute relating to the inaccuracy of a notice relieves the plaintiff of the dangers arising from an inexact statement when he did not intend to mislead the defendant or when the latter was not in fact misled. When, therefore, a plaintiff gives a notice setting up a certain cause of action, and the defendant has no reason to believe that the cause stated is not the one upon which the plaintiff is to rely, the plaintiff should be concluded by the statements contained in his notice, and not permitted at the trial to prove a different state of facts under a declaration counting on a different cause of action. The only way in which he may be permitted to offer such a notice under such a declaration is first to prove that the defendant in fact knew at the time when the notice was given that the cause of action set out in the declaration, and not the cause stated in the notice, was the one upon which he intended to rely. Only by such a ruling can the purpose of the notice be secured. A notice so phrased that upon inquiry the defendant would discover the cause later alleged in the declaration would be a good notice, if there was no intention to mislead, and the defendant by the notice or otherwise was not in fact misled. But if the notice states a certain cause, then it should be evidence only under a declaration counting upon that

cause, since otherwise the defendant is misled by the terms of the notice itself. Thus, a notice stating that the injury happened "by reason of the negligence of your superintendent" should not be received in evidence under a declaration counting upon a defect in ways, works, and machinery unless the plaintiff proves that at the time of the notice the defendant knew that the cause of the injury on which the plaintiff would rely was the defect alleged.⁸⁷

In an early case, decided before the statutes relating to inaccuracy were passed, a notice stated the cause of an injury to be "an iron grating in said sidewalk at said place, which was defective and out of repair, and projected above the level of said sidewalk two inches or more, over the projecting part of which the plaintiff tripped and fell." The evidence showed the existence of the grating, and that it was defective, but also that the plaintiff slipped on the ice, and did not touch the grating until she fell upon it. The court said: "The cause of her injury which the statute required the plaintiff to state was the defect or want of repair which caused her fall, and she undertook to state it; but if the evidence introduced by the defendant was believed, she had stated an entirely wrong cause. The city was not liable because the grating was not a desirable thing to fall upon, if it in no way caused the fall. * * * A notice stating a wrong cause would obviously be, not only of less use than a general notice, but positively misleading and injurious to the defendant. The ruling of the superior court 'that the plaintiff was bound by

⁸⁷ *Supra*, § 29.

the statement in the notice as to the cause of the accident, and was limited to the defect stated therein, and that, if her foot did not come in contact with the grating at all, but the cause of her fall was the ice, she could not recover because in falling she struck the grating,' was right."⁸⁸

In a case decided since the passage of the statutes relating to inaccuracies, the notice stated the cause of the accident to be "large stones extending about six feet into the traveled part of said way * * * in such grotesque and unusual shape that they constituted a nuisance by their liability to frighten horses." The court said: "An injury resulting from such a cause is not one for which a city or town is liable, and the jury were instructed at the trial that, in order to recover, the plaintiff must satisfy them that a collision with the pile of stones was the sole cause of the accident. The notice gave the authorities of the city no reason to expect that the plaintiff would present at the trial such a case as that on which she finally relied. They might well assume that the statement in the notice was true, and that the plaintiff claimed damages on account of an accident caused by the fright of her horse at a pile of stones of such a grotesque and unusual shape as to be likely to frighten horses. * * * Under this statute [of 1882, c. 36], the burden of proof is on the plaintiff to show that the defendant was not misled by the notice, as well as that there was no intention to mislead. This may often be inferred from the circumstances, without testimony directly to the point. But in the

⁸⁸ McDougall v. City of Boston, 134 Mass. 149.

present case the notice was of a kind which would have a direct tendency to mislead, and there was no evidence tending to show that the authorities were not misled by it, or that, as set out in the bill of exceptions, they 'ever, until the time of trial, had a different account of the accident from the one given in the notice.' Such a notice, and such an investigation as the authorities would naturally make on account of it, would be likely to lead them to rest their defense on the legal proposition that cities are not liable for accidents caused by the fright of horses from objects of a grotesque or unusual appearance in the street. * * * We are of opinion that there was no evidence on which the jury could find that the notice was sufficient to enable the plaintiff to recover for an injury caused by a collision with a pile of stones, and that the ruling requested on this point should have been given."⁸⁹

An amendment of the notice after suit is brought is not permitted;⁹⁰ and it would seem that, apart from the case of an omission of the time, place, or cause provided for by Acts Mass. 1894, c. 389, the rights of the plaintiff and the defendant in regard to the sufficiency of the notice should be fixed at the expiration of sixty days. It would defeat the purpose of the notice, and be manifestly unfair to the defense, to allow the plaintiff to show that, although his notice alleged a certain state of facts, some months afterwards he informed the defendant that he should rely at the trial on a different cause, and thereby compel the defendant

⁸⁹ *Bowes v. City of Boston*, 155 Mass. 344, 348; *Benson v. City o. Madison*, 101 Wis. 312; *supra*, § 29.

⁹⁰ *Leonard v. Bath*, 61 N. H. 67.

to investigate a condition of things which the lapse of time might have changed entirely, and which, when the notice was received, he had no reason to believe would be relied upon by the plaintiff.

§ 34. Limitation of action.

The act limits the time within which actions under it may be brought.

Such a provision is not strictly a statute of limitations, but a condition affixed to a new right of action, and the saving clauses in the general statutes of limitation do not apply to it.

The English act provides that the suit must be begun "within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death." In Massachusetts the action must be "commenced within one year after the accident which causes the injury or death," and in Colorado the period is two years.⁹¹

Neither the Indiana nor Alabama acts contain any limitation in their provisions. In Indiana the action is governed by the general statute of limitations, but if the injury results in death, by virtue of the clause, "the action shall be governed in all respects by the law now in force as to such actions," the limitation of two years found in the statute giving a remedy for death by wrongful act is applied.⁹² In Alabama, whether the injury results in death or not, the action must be begun within the time limited by the general statute of limitations,

⁹¹ 43 & 44 Vict. c. 42, § 4; Rev. Laws Mass. c. 106, § 75 (see Acts 1900, c. 446); Sess. Laws Colo. 1893, c. 77; Mills' Ann. St. 1891-96, § 1511a; Hayes v. Williams, 17 Colo. 465.

⁹² Burns' St. 1901, § 285; Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 230.

and the period mentioned in the statute giving a remedy for death by wrongful act does not apply to a suit under the act.⁹³

The time limit which is found in the statutes giving a right of action for death by wrongful act is considered, not a statute of limitations, but rather a condition imposed upon the enforcement of a new remedy.⁹⁴ "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted, in all respects, as the statute gives it. Why the action was not brought within the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun."⁹⁵ The act does not contain any saving clauses, and the clauses of the general statute of limitations do not apply. Thus, under the statutes giving a remedy for death by wrongful act, the suit must at all events be begun within the time limited;⁹⁶ and under the act it has been held in Scotland that it was no excuse for failing to bring an action within the

⁹³ *O'Kief v Memphis & C. R. Co.*, 99 Ala. 524.

⁹⁴ *Maylone v. City of St. Paul*, 40 Minn. 406; *Hill v. Board of Sup'rs Rensselaer County*, 119 N. Y. 344. Thus, if the facts in the complaint show that the action was brought too late, the objection may be taken by demurrer, rather than by pleading the limitation. *Hanna v. Jeffersonville R. Co.*, 32 Ind. 113.

⁹⁵ *Taylor v. Cranberry I. & C. Co.*, 94 N. C. 525, 526.

⁹⁶ *Foster v. Yazoo & M. V. R. Co.*, 72 Miss. 886; *Hill v. Town of New Haven*, 37 Vt. 501; *Best v. Town of Kinston*, 106 N. C. 205; *Louisville & N. R. Co. v. Sanders*, 86 Ky. 259; *Elliott v. Brazil Block Coal Co.*, 25 Ind. App. 592.

six months that the plaintiff, during a part of that time, had been confined in a hospital for the insane.⁹⁷

If the plaintiff suffers a nonsuit, a new action must be brought within the time limited after the occurrence of the accident;⁹⁸ and, in computing the time, the day upon which the accident happened is excluded.⁹⁹

§ 35. Amendments.

An amendment to a declaration filed after the period of limitations has elapsed is barred if it sets up a new cause of action.

The addition of a count under the act to a declaration at common law sets up a new cause of action.

When a complaint, itself filed within the period of limitations, is amended by a pleading filed after that period has expired, adding either a new count or varying the facts already alleged, the question whether the amendment is barred by the statute of limitations depends upon whether it sets up a new cause of action or would amount to a departure in pleading. "While a new cause of action may be introduced by amendment, the established limitation on the operation of its relation to the commencement of the suit is that if the amendment introduces new matter or a different cause of action not within the *lis pendens*, as to which the statute of limitations has operated as a bar at the time

⁹⁷ Johnston v. Shaw, 21 Scot. Law R. 246. See, also, Stern v. La Compagnie Generale Transatlantique, 110 Fed. 996.

⁹⁸ Shea v. Boston & M. R. R., 154 Mass. 31.

⁹⁹ Louisville & N. R. Co. v. Watson, 90 Ala. 68; Bemis v. Leonard, 118 Mass. 502; Seward v. Hayden, 150 Mass. 153.

of making the amendment, it is as available as if the amendment were a new and independent suit.”¹⁰⁰

When an amendment merely relates the particulars of the accident, it does not set out a new cause of action.¹⁰¹ But if it adds new parties, or changes the beneficiaries, it is barred by the statute.¹⁰²

When the original declaration sets out facts under a common-law count, the addition of a new count, or of allegations, under the act, is a new cause of action. Thus where, pending the appeal of an action at common law, it was discovered that a notice had been given, and it was sought to treat the action as if brought under the act, it was held that this might have been permitted, save that the period limited had passed.¹⁰³ The same rule is applied where the new matter is a statute of a foreign state, with the qualification that, if that statute contains its own period of limitation, that period shall govern; otherwise, the general limitation statutes of the forum.¹⁰⁴ If the original complaint pleads the statute

¹⁰⁰ Alabama G. S. R. Co. v. Smith, 81 Ala. 229; Peerless Stone Co. v. Wray, 152 Ind. 27; Union Pac. Ry. Co. v. Wyler, 158 U. S. 285.

¹⁰¹ Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48; City Council of Sheffield v. Harris, 112 Ala. 614; Cincinnati, N. O. & T. P. Ry. Co. v. Gray (C. C. A.) 101 Fed. 623; Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593. See Yager's Adm'r v. Receivers, 88 Fed. 773.

¹⁰² Memphis & C. R. Co. v. Hoechner (C. C. A.) 67 Fed. 456; Atlanta, K. & N. Ry. Co. v. Hooper (C. C. A.) 92 Fed. 820.

¹⁰³ Clark v. Adams, 12 Rettle, Ct. Sess. Cas. (4th Ser.) 1092; Bolton v. Georgia Pac. Ry. Co., 83 Ga. 659. See, also, Union Pac. Ry. Co. v. Wyler, 158 U. S. 285.

¹⁰⁴ Selma, R. & D. R. Co. v. Lacey, 49 Ga. 106; South Carolina R. Co. v. Nix, 68 Ga. 572; O'Shields v. Georgia Pac. Ry. Co., 83 Ga. 621; Bolton v. Georgia Pac. Ry. Co., 83 Ga. 659; Union Pac. Ry. Co. v. Wyler, 158 U. S. 285. See *infra*, § 36.

defectively, an amendment which properly pleads it is not a new cause of action,¹⁰⁵ but, if there is no attempt to plead the statute in the original complaint, setting it up afterwards is a departure, although it would be supported by the same facts.¹⁰⁶

In Alabama it is considered that, where the original complaint sets out a cause of action at common law, an amendment setting up the act is within the *lis pendens* of the suit, and is not a new action; but upon this point it is to be noticed that the Alabama act does not contain any special limitation or the prerequisite of notice.¹⁰⁷ The addition to a declaration under the act of a new count on a different subdivision of the statute is not a new action.¹⁰⁸

The defense that the cause of action set up by an amendment is barred by the statute of limitations is not waived by consent to the filing of the amendment.¹⁰⁹

§ 36. Conflict of laws.

When the act limits the time within which suit must be begun, rights acquired under it must be enforced in a foreign jurisdiction within the time thus limited.

If there is no such provision, the general statutes of limitation of the forum control.

The general rule is that the law of the place where the injury was sustained governs the substantive rights

¹⁰⁵ South Carolina R. Co. v. Nix, 68 Ga. 572. See Daley v. Boston & A. R. Co., 147 Mass. 101.

¹⁰⁶ Bolton v. Georgia Pac. Ry. Co., 83 Ga. 659.

¹⁰⁷ Louisville & N. R. Co. v. Woods, 105 Ala. 561.

¹⁰⁸ Birmingham Furnace & Mfg. Co. v. Gross, 97 Ala. 220; Alabama G. S. R. Co. v. Chapman, 83 Ala. 453.

¹⁰⁹ Union Pac. Ry. Co. v. Wyler, 158 U. S. 285.

of the parties, and the law of the forum governs all questions of remedy.¹¹⁰ Statutes of limitation affect only the remedy, and consequently the statutes of the forum control in this regard, unless the law of the place where the injury occurred makes them a part of the substantive rights of the parties.

A statute giving a new remedy, and providing that this remedy must be enforced within a limited time, annexes a condition to the substance of the remedy, and rights acquired under such a statute must be enforced in any foreign jurisdiction within the period which the statute provides, without regard to the law of the forum.¹¹¹ But if the right sought to be enforced is one given by the common law of the place where the cause of action arose,¹¹² or is one given by a statute which does not contain its own period of limitation, but leaves the time of bringing the action to be determined by the general statute of limitations,¹¹³ then the suit must be begun in a foreign jurisdiction within the period established by the general statutes of limitations of the forum.

¹¹⁰ *Supra*, § 7.

¹¹¹ *Boyd v. Clark*, 8 Fed. 849; *Nonce v. Richmond & D. R. Co.*, 33 Fed. 429; *Theroux v. Northern Pac. R. Co. (C. C. A.)* 64 Fed. 84; *Boston & M. R. R. v. Hurd (C. C. A.)* 108 Fed. 116; *The Harrisburg*, 119 U. S. 199, 214; *Halsey v. McLean*, 12 Allen (Mass.) 438; *Selma, A. & D. R. Co. v. Lacey*, 49 Ga. 106; *South Carolina R. Co. v. Nix*, 68 Ga. 572.

¹¹² *Boyd v. Clark*, 8 Fed. 849; *Johnston v. Canadian Pac. Ry. Co.*, 50 Fed. 886; *Canadian Pac. Ry. Co. v. Johnston (C. C. A.)* 61 Fed. 738; *Finnell v. Southern Kan. Ry. Co.*, 33 Fed. 427.

¹¹³ *Boyd v. Clark*, 8 Fed. 849; *Munos v. Southern Pac. Co. (C. A. A.)* 51 Fed. 188.

Thus, where an accident happened in Alabama, and suit was brought in Georgia, under the employers' liability act of Alabama, which does not contain any special limitation, it was held that the Georgia statutes of limitation governed;¹¹⁴ and the same court also held, in an action under the Alabama statute giving a remedy for death by wrongful act, and providing the period within which action must be brought, that the period thus limited should be followed.¹¹⁵

The same rules are applied when the question is whether an amendment to a complaint sets up a new cause of action, and is consequently barred by the statute of limitations.¹¹⁶

When the statute giving a new remedy provides as a prerequisite to the action the giving of a notice of the injury by the employe to the employer, this is a part of the substantive rights of the parties, and an action cannot be maintained in a foreign jurisdiction to enforce rights acquired under such a statute without proof that the notice was duly given.¹¹⁷

¹¹⁴ *O'Shields v. Georgia Pac. Ry. Co.*, 83 Ga. 621; *Bolton v. Georgia Pac. Ry. Co.*, 83 Ga. 659.

¹¹⁵ *Selma, A. & D. R. Co. v. Lacey*, 49 Ga. 106.

¹¹⁶ *Bolton v. Georgia Pac. Ry. Co.*, 83 Ga. 659; *Selma, A. & D. R. Co. v. Lacey*, 49 Ga. 106; *Union Pacific Ry. Co. v. Wyler*, 158 U. S. 285.

¹¹⁷ *Glynn v. Central R. Co.*, 175 Mass. 510. See, also, *Stern v. La Compagnie Generale Transatlantique*, 110 Fed. 996.

CHAPTER IV.

DEFECT IN CONDITION.

- § 37. Common Law.
- 38. Effect of Clause.
- 39. Defect in Condition.
- 40. Permanence.
- 41. Negligent User.
- 42. Connected with or Used in.
- 43. Ways, etc., in Process of Construction or Destruction.
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- 45. Ways.
- 46. Works.
- 47. Machinery.
- 48. Plant.
- 49. Negligence.
- 50. Res Ipsa Loquitur.
- 51. Statutory Enactments.
- 52. Negligence of the Employer.
- 53. Negligence of a Person Intrusted.
- 54. Court or Jury.

§ 37. Common law.

At common law, the master impliedly agrees to use reasonable care to provide reasonably safe premises and places in and about which the servant is required to work, to furnish reasonably safe and suitable machinery and a sufficient supply of proper materials, tools, and appliances for the work to be done, and at all times during the continuance of the work to repair and to keep in the same safe and suitable condition the places, machinery, and appliances.

The master is not an insurer, and is not required to provide the safest possible plant or to adopt the latest improvements,

or to warrant against latent defects which a reasonable inspection would not disclose. But the dangers inherent in the nature of the work must not be enhanced through his fault.

These duties are personal to the master, and he cannot, by delegating the performance of them to agents, escape liability.

The implied term in the contract of service that the master shall exercise due care in providing and maintaining suitable and proper machinery, appliances, materials, and structures for the business in which he and his servants are engaged has been enforced in all jurisdictions.¹

The master's "obligation involves the exercise of every kind of care and diligence which is necessary to give him knowledge of the condition as to safety of his machinery and appliances, so far as such knowledge is obtainable by reasonable effort. His duty relates to the condition of these articles when they come to the hands of his servants for use, and the performance of that duty must carry him just so far into details as it is

¹ *Wilson v. Merry*, L. R. 1 H. L. Sc. 326; *Brydon v. Stewart*, 2 Macq. H. L. Cas. 30; *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266; *Hanson v. Lancashire & Y. Ry. Co.*, 20 Wkly. Rep. 297; *Roberts v. Smith*, 26 L. J. Exch. 319; *Weems v. Mathieson*, 4 Macq. H. L. Cas. 215; *Hough v. Railway Co.*, 100 U. S. 213; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 570; *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346; *Wells v. Coe*, 9 Colo. 159; *Grant v. Varney*, 21 Colo. 329; *Ohio & M. R. Co. v. Percy*, 128 Ind. 197; *Louisville, N. A. & C. Ry. Co. v. Bates*, 146 Ind. 564; *Cole Bros. v. Wood*, 11 Ind. App. 37; *Smoot v. Mobile & M. P. Co.*, 67 Ala. 13; *Louisville & N. R. Co. v. Allen's Adm'r*, 78 Ala. 494; *Louisville & N. R. Co. v. Binion*, 107 Ala. 645; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; *Johnson v. Boston Tow Boat Co.*, 135 Mass. 209; *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198; *Moynihan v. Hills Co.*, 146 Mass. 586. See cases collected, *Mast v. Kern*, 75 Am. St. Rep. 591.

reasonably necessary to go, in view of the nature and risks of the business, to enable him reasonably to protect his servants from a danger which he should prevent.”² This obligation is performed when he furnishes machinery and facilities “of ordinary character and reasonable safety; and the former is the test of the latter, for, in regard to the style of implement or nature of the mode of performance of any work, ‘reasonably safe’ means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community.”³

² *Moynihan v. Hills Co.*, 146 Mass. 586, 592.

³ *Titus v. Bradford, B. & K. R. Co.*, 136 Pa. 618, 626. As to custom in the business, see *Myers v. Hudson Iron Co.*, 150 Mass. 136; *Richmond & D. R. Co. v. Jones*, 92 Ala. 218; *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454.

The standard of care is the same, whether applied to the furnishing of structures and machinery, or to the maintenance of them. The master is not an insurer, and does not warrant the safety of his plant. He is not obliged to make it as safe as possible by unreasonable precautions, nor must he procure the safest possible machinery and adopt the latest improvements.⁴ If he erects his structures or builds his machines, he must use reasonable care in the work; but, if the machinery and appliances are to be found on the market, his duty is fulfilled by purchasing them from reputable makers, and he is not responsible for hidden or latent defects in them not discoverable upon reasonable inspection.⁵

The duty to guard against defects or want of repair is a continuing one, and the master is chargeable with knowledge of all defects which might have been discovered upon reasonable inspection.⁶ But the master is not required to resort to unreasonable, impractical, and oppressive tests.⁷

⁴ *Hough v. Railway Co.*, 100 U. S. 213; *Louisville & N. R. Co. v. Orr*, 84 Ind. 50. Where machine permitted the escape of fumes of chemicals, and newer machines guarded against it, there was no liability under the act. *Butler v. Birnbaum*, 7 Times Law R. 287.

⁵ *Louisville & N. R. Co. v. Allen's Adm'r*, 78 Ala. 494; *Ladd v. New Bedford R. Co.*, 119 Mass. 412; *Garragan v. Fall River Iron Works Co.*, 158 Mass. 596; *Shea v. Wellington*, 163 Mass. 364; *Reynolds v. Merchants' Woolen Co.*, 168 Mass. 501; *Fuller v. New York, N. H. & H. R. Co.*, 175 Mass. 424. See *Roughan v. Boston & L. Block Co.*, 161 Mass. 24.

⁶ *Spicer v. South Boston Iron Co.*, 138 Mass. 426; *Sweat v. Boston & A. R. Co.*, 156 Mass. 284.

⁷ *Deane v. Roaring Fork E. L. & P. Co.*, 5 Colo. App. 521; *Louisville & N. R. Co. v. Campbell*, 97 Ala. 147; *Campbell v. Louisville & N. R. Co.*, 109 Ala. 520; *Shea v. Wellington*, 163 Mass. 364.

But although the master is under the duties towards his servants thus generally stated, the measure of his obligation and care in the particular case depends upon the circumstances at the time of the employment, and the knowledge which the servant then had. The servant assumes the risk of injury from the existing condition of things, if he knows and appreciates the danger, and the consideration of this question is reserved for a subsequent chapter.⁸

The duty is personal.

The courts of England and of the United States agree in the duty which the master must personally perform, but there is a wide divergence between them upon the question how far this duty may be delegated to an agent so as to relieve the master from liability for the latter's negligence. In England a servant cannot recover for the negligent act of another servant in the common employment, and the character of the act or the capacity in which it is performed is immaterial. Thus, it has been said: "What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do."⁹ Nowhere in the United States has the "fellow-servant exemption" been

⁸ *Infra*, c. 8, "Assumption of Risk."

⁹ *Wilson v. Merry*, L. R. 1 H. L. Sc. 326, 332; *Murphy v. Phillips*, 24 Wkly. Rep. 647; *Balleny v. Cree*, 11 Rettie, Ct. Sess. Cas. (4th Ser.) 626.

applied with equal strictness. It is considered that these duties are personal to the master, and cannot be delegated by him to an agent; that servants who are intrusted with these duties are, as to them, not within the definition of "fellow servants," and the injured servant does not assume the risk of their negligent performance of the duty.¹⁰ The test is the character of the act.

The opinion in *Moynihan v. Hills Co.*¹¹ is instructive upon this question. "Work negligently done within that field, if an accident should happen from it, would seem at first to introduce a conflict between the obligation of the master to hold himself liable for want of due care in keeping his machinery safe, and the obligation of the servant not to claim damages resulting from negligence of a fellow servant. * * * The application, in each particular case, of any general rules which may be laid down, will involve a consideration of two questions of fact: First, what is the nature and character of the business, and the usual and proper general method of conducting it? Secondly, in such a business, what is reasonably necessary to be done on the part of the master to secure for the use of the workmen machinery and appliances which will always be reasonably safe? First, there is that class of cases in which the condition of a machine as to safety is constantly changing with its use, so as to require from the persons tending it, as a part of the ordinary use of it, reconstruction or read-

¹⁰ *Hough v. Railway Co.*, 100 U. S. 213; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Gilman v. Eastern R. Co.*, 13 Allen (Mass.) 433; *Ryalls v. Mechanics' Mills*, 150 Mass. 190. See *infra*, § 55.

¹¹ 146 Mass. 586, 593.

justment of parts, as they become worn out or displaced, from materials or new parts supplied by the master for that purpose. Such work is a part of the regular business of the servant in using the machine, and not of the master in maintaining it. Negligence in doing it is, as to all other employes, negligence of a fellow servant. So far as the condition of machinery depends upon this kind of attention, the master does his duty if he employs competent and suitable persons, and supplies them with everything needed for their work. A second class of cases includes those in which repair or reconstruction of a machine is necessary, of such a kind as is commonly done, or may properly be done, under the direction of the master, by servants engaged in the general business. Both parties to the contract must be presumed to have contemplated that such work would be done by fellow servants of the employe, and he must therefore be held to have assumed all risks from their negligence in doing it. But this, it must be remembered, is a part of that work for the results of which, in the completed machine, the master agrees to hold himself responsible, so far as good results can be insured by his exercise of proper care. And so he is bound to bring to this department of the business, either in his own person or by an agent, such intelligence, skill, and experience as is reasonably to be required in one to whom, in an important particular, the safety of others is intrusted, and he is bound also to be reasonably diligent and careful in the use of his faculties. One who represents him in this field is not acting as a fellow servant with his other employes, within the meaning of the rule which we are considering, but is

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his agent or servant, for whose care and diligence he is accountable. There may be still a third class of cases, in which a machine is of such a kind, and the nature of the business in which it is used is such, that the parties could never reasonably have contemplated that any servants employed in the business would build or reconstruct it. * * * Upon our hypothesis it would be inconsistent with his implied contract to employ fellow servants of his employe in this work, and he therefore could not relieve himself from his general obligation as to the safety of his machinery by setting up that his servants, in the construction or reconstruction, were fellow servants with his employes in the business in which it was to be used."

§ 38. Effect of clause.

This clause of the act is, in the United States, substantially a declaration of common-law principles, and the master's responsibility is not enlarged by it.

In considering the effect of the act it is necessary to bear in mind that it was directed solely to the "fellow-servant exemption" at common law, and did not purport to change or affect the master's responsibility for his own negligence. The duty which the master owes to his servants to provide and maintain reasonably safe and suitable places, machinery, and plant is not affected; the clause deals only with the question of the master's responsibility when he has delegated to other servants the performance of these duties.¹²

In England, the servant charged with the performance of such duties was at common law the fellow serv-

¹² Supra, § 2.

ant of the person injured through his negligence, and the master escaped liability. It was to this exemption from liability that the clause in question was directed, and its primary effect was to remove the defense of fellow service and implied assumption of risk in all cases where the master intrusted to a servant the duty of seeing that his ways, works, and machinery were in proper condition.¹³

In the states which have enacted employers' liability acts a different rule was established at the common law, and it is held that servants intrusted with such duties are not fellow servants, but delegates of the master, for whose negligence in the performance of these personal duties the master is responsible.¹⁴

Thus, although the provision as to defects in the condition of the ways, works, and machinery found in the English act¹⁵ has been adopted substantially in the acts of Alabama,¹⁶ Massachusetts,¹⁷ Colorado,¹⁸ and

¹³ *Morrison v. Baird*, 10 Rettie, Ct. Sess. Cas. (4th Ser.) 271; *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357; *Yarmouth v. France*, 19 Q. B. Div. 647; *supra*, § 37; *infra*, § 55.

¹⁴ *Supra*, § 37; *infra*, § 55.

¹⁵ 43 & 44 Vict. c. 42, § 1, cl. 1: "By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer."

Section 2: "A workman shall not be entitled, under this act, to any right of compensation or remedy against the employer in any of the following cases, that is to say: (1) Under subsection one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition."

¹⁶ Civ. Code Ala. 1896, § 1749 (2590) subd. 1: "When the injury is caused by reason of any defect in the condition of the ways, (200)

Indiana,¹⁰ yet the state of the law in these jurisdictions did not call for the passage of such a statute, and it has not operated to increase the master's liability or to give to the servant any rights which were not previously fully secured to him by the common law. In England it was a radical extension of the master's responsibility, but in the United States it is only declaratory of the common law.

It has been said in Alabama that the act "does not undertake to define what shall constitute a defect or negligence in regard to the condition of the ways, works,

works, machinery, or plant connected with or used in the business of the master or employer."

"Nor is the master or employer liable under subdivision 1 unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition."

¹⁷ Rev. Laws Mass. c. 106, § 71: "First, a defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied in consequence of, the negligence of the employer, or of a person in his service who had been intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition."

¹⁸ Mills' Ann. St. Colo. § 1511a (Sess. Laws Colo. 1893, c. 77), are the same as the Massachusetts clause above quoted.

¹⁹ Burns' Rev. St. Ind. 1901, § 7083; Acts Ind. 1893, c. 130, § 1: "First, when such injury is suffered by reason of any defect in the condition of ways, works, plant, tools, and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person intrusted by it with the duty of keeping such ways, works, plant, tools, or machinery in proper condition."

For similar statutes in other states, see St. Wis. 1898, c. 87, § 1816; Priv. Laws N. C. 1897, c. 56.

machinery, or plant. To determine these matters, reference must be made to the principles of the common law. Therefore, whether the plaintiff's right to recovery is based on the statutory or common-law liability of an employer, the measure of defendant's duty to plaintiff is substantially the same."²⁰

The view of the Massachusetts court is thus expressed in an early case: "In 1887 it was settled law in Massachusetts that masters were personally bound to see that reasonable care was used to provide reasonably safe and proper machinery, so that, if the duty was intrusted to another, and was not performed, the fact that the proximate cause of the damage was the negligence of a fellow servant was no defense. * * * The rule in *Wilson v. Merry* [L. R. 1 H. L. Sc. 326] practically, if not in terms, had been modified very much in favor of servants. * * * Thus, it falls out that the part of section 1 to which we are referring seems at first sight to add nothing to the common law as previously declared, and by its form has very much the air of a legislative enactment of the principle of the cases. But we should assume that section 1, cl. 1, was nugatory, sooner than admit that it cut down the common-law rights of employes under the deceptive form of enlarging them. * * * The purport of the whole is still only to abolish, perhaps, the defense of implied assumption of risk, and certainly that of negligence of a fellow servant, * * * as it was in the English statute, and as is manifestly the case in the second and third clauses of the same section.

²⁰ *Wilson v. Louisville & N. R. Co.*, 85 Ala. 269, 272; *Colorado M. & E. Co. v. Mitchell*, 26 Colo. 284; *New York, N. H. & H. R. Co. v. O'Leary* (C. C. A.) 93 Fed. 737, 741.

* * * If there are no cases for which the first clause is needed, all that is to be said is that to that extent the legislature too hastily assumed that the law of Massachusetts was the same as that of England."²¹

The "extremes, if any, lying outside the common-law rule, but embraced by section 1, cl. 1,"²² have not been pointed out as yet by the courts. It is possible that the master's liability has been extended in the matter of foreign cars,²³ and the question whether those persons whose duty it is to make the ordinary daily small repairs incident to the running of certain machines come within the act has been left open.²⁴

§ 39. Defect in condition.

Defect in the condition means not only an imperfection or fault in the working capacity of the ways, works, or machinery themselves, but also a failure to do properly and safely the work for which the master intends them to be used.

The phrase used in this clause is "defect in the condition," and in defining it a distinction has been taken between "defect" and "defect in the condition." "'Defect' means a lack or absence of something essential to completeness. * * * A machine may be, in its nature or character, a perfect machine, and yet be in an imperfect and defective condition. The condition of the plant or machinery means, I think, the state of the

²¹ Ryalls v. Mechanics' Mills, 150 Mass. 190, 194; Ashley v. Hart, 147 Mass. 573, 575; Murray v. Knight, 156 Mass. 518; supra, § 37.

²² Ryalls v. Mechanics' Mills, 150 Mass. 190, 196.

²³ Infra, § 42.

²⁴ Ryalls v. Mechanics' Mills, 150 Mass. 190, 195; supra, § 37; infra, § 53. As to whether the common law has been extended by making danger per se a defect, see infra, § 39.

plant or machinery at the time of the injury.”²⁵ “The words are ‘defect in the condition of the machinery,’ not ‘defect in the machinery.’ As the presiding judge very properly ruled, they do not refer to its working capacity, but to its condition with regard to the safety of the employees.”²⁶

“If you strike out the word ‘condition,’ and speak of a defect in the way, I think it is perfectly plain that would mean a hole in the road, or stones forming part of the road which stick out, or something or other which actually injured the way, and which showed that the way itself—the actual thing—was not suited for the purpose for which it was intended; and that would apply also to the works and to the machinery and to the plant. A defect in the machinery would be the absence of some part of the machinery, or a crack, or anything of that kind. A defect in the condition of the way, or works or machinery or plant, is certainly wider, but I do not think it is very much wider. It means, I should be inclined to say, such a state of things that the power and quality of the subject to which the word ‘condition’ is applied are for the time being altered in such a manner as to interfere with their use. For instance, if the way is made to be muddy by water, or if it is made slippery by ice, in either of these cases I should say that the way itself is not defective, but the condition of the way, by reason of the water which is incorporated with it, or from its being in a freezing state, is affected. * * * I do not think we ought to put so wide a construction on the words ‘condition of the way’ as to include ob-

²⁵ *Tate v. Latham* [1897] 1 Q. B. 502, 506.

²⁶ *Willey v. Boston Electric Light Co.*, 168 Mass. 40, 42.

stacles lying upon the way, which obstacles do not in any degree alter the powers of the way, or alter its fitness for the purpose for which it is generally employed, and cannot be said to be incorporated with it."²⁷

Unsuitableness.

"An unsuitableness of ways, works, or machinery for work intended to be done * * * by means of them is a defect, within the meaning of St. 1887, c. 270, § 1, cl. 1, although the ways, works, or machinery are perfect of their kind, in good repair, and suitable for some work done in the employer's business other than the work in doing which their unsuitableness causes injury to the workmen. In such a case the employer is wrong in furnishing appliances for a use for which they are unsuitable, and in effect in so ordering and carrying on his work that, without fault of the ordinary workman, the natural consequence will be that the appliances will be used for purposes for which they are unsuitable. The circumstance that the employer intends that his work shall be done in the manner and by the means in use when the accident occurs distinguishes the case from those in which he furnishes a stock of appliances from which the workman is to select such as are fit for the particular work in hand. * * * Such an unsuitableness is neither accidental nor temporary, nor due to the negligence of a workman who is not charged with the duty of attending to the fitness of the ways, works, and machinery. * * * An employer cannot say that he is not in fault if his ways, works, and machinery,

²⁷ McGiffin v. Palmer's S. & I. Co., 10 Q. B. Div. 5, 9.

when used as he intends them to be used, are unsuitable for his work.”²⁸

“The question is whether the fact that the machine was unfit for the purpose for which it was applied constitutes a ‘defect in its condition.’ * * * The question really almost answers itself. If it was not in a proper condition for the purpose for which it was applied, there was a defect in its condition, within the meaning of the act. * * * The argument for the defendants comes to this: that if the employer has a machine, one part of which is weaker than it ought to be, there is a defect in its condition; but if the whole machine is too weak for the purpose for which it is applied, there is no such defect. Could it be said, if a windlass fit only for raising a bucket is used to draw up a number of men, that there is no defect in the condition of the machinery? The condition of the machine must be a condition with relation to the purpose for which it is applied.”²⁹

²⁸ *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202, 217.

²⁹ *Heske v. Samuelson*, 12 Q. B. Div. 30, 31; *Cripps v. Judge*, 13 Q. B. Div. 583. Crane used to tear up railroad ties, *Welsh v. Moir*, 12 Rette, Ct. Sess. Cas. (4th Ser.) 590; door used as a fire cut-off could not be quickly closed, *Johnson v. Mitchell*, 22 Scot. L. R. 698; absence of proper means of throwing saw out of gear, *Topham v. Goodwin* (Nov. 5, 1881) 72 Law T. 10; failure to fence elevator used to carry coke, whereby a piece fell, *Heske v. Samuelson*, 12 Q. B. Div. 30; ladder used to support staging, *Cripps v. Judge*, 13 Q. B. Div. 583; tackle and engine used in hoisting ice, *Carbury v. Downing*, 154 Mass. 248; truck unsuitable for moving heavy machinery, *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202; and *Gunn v. New York, N. H. & H. R. Co.*, 171 Mass. 417. *Infra*, § 41, note 44. Also §§ 45-47.

Danger.

Whether a machine dangerous in itself is defective, within the meaning of the act, is a question which has been much debated in England. In the first case which considered the question, the disk of a wheel in a carding machine was perforated, instead of being solid, and thereby the accident was caused. The court held that there was no evidence that this condition, if it was a defect in condition, arose from negligence. "It is said that there is evidence of the machine being dangerous. So are most machines, so is even an ordinarily sharp knife, unless used with care; but that does not make it defective in its condition, nor does it imply negligence in the employer, if an accident happens, who furnishes it to his workman for him to use with reasonable care." Lord Esher in his dissenting opinion said: "The true question seems to me to be whether the machine is dangerous, and whether a careful consideration would shew it to be dangerous to the workman using it. I am prepared to say that if a careful consideration would shew a master that the machine was dangerous to the workman using it, even although that machine could not be improved upon, it is negligence on the part of the master to use for his profit a machine which is dangerous to his workman, and, if he does use it, he can only do so upon the terms of being liable to pay compensation to the workman, if he is thereby injured."³⁰

This case of *Walsh v. Whiteley* was considered in a later case,³¹ where the defect consisted in unguarded cogwheels at the side of a leather pressing machine, in

³⁰ *Walsh v. Whiteley*, 21 Q. B. Div. 371, 376, 379.

³¹ *Morgan v. Hutchins*, 33 Wkly. Rep. 412, 6 Times Law R. 219.

which a boy's hand was caught. The court, of which Lord Esher was a member, said that condition included the surrounding circumstances,—“that is, the way in which the machinery is to be used; the defect need not be in the machine itself. One of the surrounding circumstances of this machine is that it is to be used by men, and even by boys. * * * This machine has to be fed by a workman, and is useless unless there is a man to work it. Is not that part of the ‘condition’ of the machine? The workman is a necessary part of the machine while it is doing its work. If it is dangerous to him, is that not a defect in the machine of which he is a necessary part? * * * If the machine is dangerous to the man without whose assistance it cannot be worked, and that without any fault of his own, that is a defect in the condition of the machinery.”

The view stated by Lord Esher seems to be the one adopted in England, and consequently, if a machine is dangerous to the safety of a skillful and careful operator, who is thereby injured without fault of his own, there is a defect in condition, within the act. This view is a radical extension of the common-law doctrine,³² and does not seem to be justified by any words used in the act. It has not been followed in Massachusetts, where

Revolving rollers becoming clogged, *Paley v. Garnett*, 16 Q. B. Div. 52 (see, also, *Claxton v. Mowlem*, 4 Times Law R. 756). Unfenced machinery, *Iles v. Abercarn Welsh Flannel Co.*, 2 Times Law R. 547. Shuttle flying out of loom, *Smith v. Harrison*, 5 Times Law R. 406. Absence of guard of saw not a defect, *Hamilton v. Groesbeck*, 19 Ont. 76. Dangerous kind of brake, *Louisville & N. R. Co. v. Bin-ion*, 107 Ala. 645.

³² *Supra*, § 37.

uncovered cogwheels, etc., have not been considered a defect either at common law or under the act.³³

A dangerous method of work or adjustment of machinery has in England been held a defect in condition.³⁴ In Massachusetts the ruling has been otherwise. "The court instructed the jury, in effect, that a method adopted by an employer for carrying on his business which involved danger to one or more of his servants while they were in the discharge of their duty and using reasonable care would be a defect in the ways, works, and machinery. * * * No case has yet gone so far in this state as to hold that a dangerous method of doing business may constitute a defect in the ways, works, or machinery, though there is high authority for it in England, on which the learned judge who tried the case in the superior court evidently relied."³⁵

Negligence.

The existence of a defect in the condition of the ways, works, or machinery does not create a cause of action unless the defect is the result of the negligence of the employer or of some servant for whose acts the statute makes him liable.³⁶

³³ *Hale v. Cheney*, 159 Mass. 268; *Rooney v. Sewall Day Cordage Co.*, 161 Mass. 153; *Donahue v. Washburn & M. Mfg. Co.*, 169 Mass. 574; *infra*, §§ 95, 96.

³⁴ Adjustment of derrick so that load swung over plaintiff's head, *Stanton v. Scrutton*, 9 Times Law R. 236, 62 Law J. Q. B. 405, and *Smith v. Baker* [1891] App. Cas. 325; cars permitted to run down grade of their own momentum, *Alabama C. Coal & Coke Co. v. Pitts*, 98 Ala. 285; blasting, *Mulligan v. McAlpine*, 15 Rettie, Ct. Sess. Cas. (4th Ser.) 789.

³⁵ Switching cars without lights or warning, *Caron v. Boston & A. R. Co.*, 164 Mass. 523, 530.

³⁶ *Infra*, § 49. As affected by assumption of risk, see *infra*, c. 8.

The words "defect in the condition" are difficult of definition. They mean something more than an imperfection, want of repair, or lack of working capacity in the machine itself, and refer rather to a failure to do properly and safely the work required of it in the circumstances and under the conditions in which it is intended by the master to be used and is used at the moment of injury.³⁷

§ 40. Permanence.

Defect in condition refers to the permanent or quasi permanent condition of the ways, works, or machinery.

An accidental or temporary condition does not come within the meaning of the act.

It has been noted in the preceding section that the defective condition must be something which so alters the power and quality of the subject as to interfere with its use. The defect must be "something in the permanent or *quasi* permanent condition of the ways, works, and machinery;"³⁸ and this idea of permanence, as distinguished from an accidental or temporary condition, was expressed, perhaps too strongly, by the use of the word "chronic" in a later opinion.³⁹

Where a workman was drawing a car loaded with iron along a way, and one of the wheels struck a piece of

³⁷ *Infra*, § 40. For rulings upon the meaning of "defect or want of repair" in the highway statute, see *Hixon v. City of Lowell*, 13 Gray (Mass.) 59, 64; *Billings v. City of Worcester*, 102 Mass. 329; *Monies v. City of Lynn*, 124 Mass. 165. Also, *Munson v. Town of Derby*, 37 Conn. 310.

³⁸ *McGiffin v. Palmer's Shipbuilding & Iron Co.*, 10 Q. B. Div. 5.

³⁹ *Willets v. Watt* [1892] 2 Q. B. 92, 100; *Lynch v. Allyn*, 160 Mass. 248, 253.

"tap" lying on the way, injuring him, it was held that the way was not in a defective condition. "I do not think we ought to put so wide a construction on the words 'condition of the way' as to include obstacles lying upon the way, which obstacles do not in any degree alter the powers of the way, or alter its fitness for the purpose for which it is generally employed, and cannot be said to be incorporated with it."⁴⁰ It was also said, by way of illustration, that, had the way been muddy or covered with ice, the way as a way would be defective. The defect must be in something which belongs to or becomes a part of the ways, works, or machinery.

The idea of permanence is also relied upon in determining whether a given place, tool, or machine is part of the ways, works, or machinery connected with or used in the business of the master.

The temporary removal of a portion of a machine,

⁴⁰ *McGiffin v. Palmer's Shipbuilding & Iron Co.*, 10 Q. B. Div. 5, 10. Loose planks used to stand on, *Franks v. Indiarubber, G. P. & Tel. Mfg. Co.* (Oct. 7, 1882) 73 Law T. 386; board thrown down opening, *Pegram v. Dixon*, 55 Law J. Q. B. 447; car standing on side track, *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 246; scraper falling from engine, *Culver v. Alabama Midland Ry. Co.*, 108 Ala. 330; oil box on track, *Louisville & N. R. Co. v. Bouldin*, 110 Ala. 185; rubbish on which staging is placed, *O'Connor v. Neal*, 153 Mass. 281; rubbish on floor, *May v. Whittier Machine Co.*, 154 Mass. 29; pile of rails near track, *Thompson v. Boston & M. R. Co.*, 153 Mass. 391; bank of earth falling, *Lynch v. Allyn*, 160 Mass. 248; stone on staging, *Carroll v. Willcutt*, 163 Mass. 221; dampness of molds, *Whittaker v. Bent*, 167 Mass. 588; pile of boards in lumber yard, *Campbell v. Dearborn*, 175 Mass. 183. But it has been held that a bar of iron projecting over the way was a defect (*Mitchell v. Coats Iron & Steel Co.*, 23 Scot. L. R. 108); and sleepers beside the way were not (*McQuade v. Dixon*, 24 Scot. L. R. 727). *Infra*, §§ 45-47.

when done for a proper purpose, does not thereby render it defective.

§ 41. Negligent user.

The negligent user by a servant of ways, works, and machinery in themselves in a proper condition is not a defect in the condition, within the meaning of the act.

The employer must furnish ways, works, and machinery fitted for the work which he requires of them, and for which he intends them to be used. If they fulfill this condition, they are not defective, and, if the servants put them to a use for which they are unfitted and were not intended, the employer is not made liable under this section of the act. Whether or not the unsuitability of the ways, works, or machinery for the purpose for which they are applied renders them defective, within the meaning of the act, depends, therefore, upon the consideration whether the employer intended them so to be used, or whether it is a use to which the servants of their own motion have put them.⁴¹

In the case of *Willetts v. Watt* there was a catchpit in the floor where workmen passed. The lid covering the hole was removed rightfully for a temporary purpose, and the plaintiff fell in. It was held that this did not constitute a defect in condition. "The way was properly constructed for a twofold purpose,—the well or catchpit might be used when required, or the place might be used for general purposes, including that of a way. It was properly adapted to subserve both these purposes, and the cause of the accident was not deficient

⁴¹ *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202; *Walsh v. Whiteley*, 21 Q. B. Div. 371. See, *supra*, § 108.

construction, but that it was negligently used for one of the purposes without notice to persons who were using it for the other."⁴² Where, however, the guard of a circular saw was removed, and left off for a considerable time, for greater ease in running the saw, it was held that this constituted a defect, and said to be a defect of a chronic character, and not one arising from negligent user.⁴³ The distinction between the cases is to be found in the fact that in the former the way was suitable and proper for two purposes, and that the injury happened because it was improperly used for one of them; in the latter, the machine without the guard was not proper for the use to which it was applied, and was intentionally used in that condition, and it was not, therefore, the negligent use of it for a proper purpose.

The principle that an employer, having furnished suitable tools, machinery, and appliances, may, without further responsibility, leave the use of them to his servants, has been recognized both at common law and under the act, and in the latter case the rule is the same whether the appliance is one coming within the definition of "ways, works, and machinery," or not. The employer is not liable for the negligent use by a servant of a proper appliance whereby another servant is injured.⁴⁴

⁴² *Willetts v. Watt* [1892] 2 Q. B. 92, 100.

⁴³ *Tate v. Latham* [1897] 1 Q. B. 502.

⁴⁴ See, also, *infra*, § 44. Using defective rope, *Johnson v. Boston Tow Boat Co.*, 135 Mass. 209; leaving blocking unfastened, *Robinson v. Blake Mfg. Co.*, 143 Mass. 528; lowering staging carelessly, *Ashley v. Hart*, 147 Mass. 573, 575; using short coupling pin, *Thyng v. Fitchburg R. Co.*, 156 Mass. 13; failure to block truck, *O'Keefe v. Brownell*, 156 Mass. 133; failure to shore trench, *Conroy v. Inhabitants of Clinton*, 158 Mass. 318; using shovel to

§ 42. Connected with or used in.

The ways, works, and machinery must be "connected with or used in the business of the employer." They must be furnished by the employer, or by his authority, express or implied, for the use of his servants in the work. Ownership is not essential, but during the time they are used the employer must have the right of control over them and power to remedy defects in them.

"By the term 'ways, works, or machinery connected with or used in the business of the employer,' we understand something in the place or means, appliances, or instrumentalities provided by the employer for doing or carrying on the work which is to be done. The use of other words may not make the meaning clearer, but

raise door, *Carroll v. Western Union Telegraph Co.*, 160 Mass. 152; failure to drill holes in stone raised by derrick, *Beauregard v. Webb G. & C. Co.*, 160 Mass. 201; using stick to pry up door, *Allen v. Smith Iron Co.*, 160 Mass. 557; using damp molds, *Whittaker v. Bent*, 167 Mass. 588; using defective coupling link, *Young v. Boston & M. R. R.*, 168 Mass. 219; using spliced ladders, *McKay v. Hand*, 168 Mass. 270, and *Jones v. Pacific Mills*, 176 Mass. 354; failure to use gang plank, *Trimble v. Whittin Machine Works*, 172 Mass. 150; hooks and pulleys arranged by servants, *Harnois v. Cutting*, 174 Mass. 398; failure to use timber, *Cogan v. Burnham*, 175 Mass. 391; failure properly to guard powder, *Mulligan v. McAlpine*, 15 Rettle, Ct. Sess. Cas. (4th Ser.) 789; using switch to mount car, *Richmond & D. R. Co. v. Bivins*, 103 Ala. 142; throwing rubbish through hole by which workmen ascended, *Pegram v. Dixon*, 55 Law J. Q. B. Div. 447; failure to steady rope causing bucket to fall, *Robins v. Cubitt*, 46 Law T. (N. S.) 535; using loose boards to stand on, *Franks v. Indiarubber G. P. & T. M. Co.* (Oct. 7, 1882) 73 Law T. 386; failure properly to pile stanchions on truck, *Corcoran v. East Surrey Ironworks Co.*, 5 Times Law R. 103. An appliance constructed by the servant does not charge master with its defects. *Callaway v. Allen* (C. C. A.) 64 Fed. 297. *Infra*, § 44. Allegation that improper appliances were used to replace derailed car does not state cause of action. *Louisville & N. R. Co. v. Jones* (Ala.) 30 So. 586.

it would seem that there must be a defect in something which can in some sense be said to be provided by the employer."⁴⁵

The question of ownership is not material. The ways, works, or machinery may be hired or in any way procured for the prosecution of the particular work. They may be owned by another, who has the general control of them, but who in the particular case has relinquished the immediate right of control to the master. He must, for the time being, have adopted the ways, etc., in his business. "It should at least appear that he has the control of them, and that they are used in his business, by his authority, express or implied. * * * Neither the employer nor any person in his service can be justly charged with negligence as to matters over which they have no control."⁴⁶

Thus, where a servant, of his own motion, borrowed a ladder which he used in his master's business, it did not thereby become a part of the ways, works, and machinery, since it was not furnished by the express or implied authority of the master.⁴⁷ But where a coal dealer sent his servants to unload a vessel which was not owned by him, but which brought coal to him, it was considered that for the time being it was a part of his plant.⁴⁸

The question has come up where one railroad uses the

⁴⁵ *Coffee v. New York, N. H. & H. R. Co.*, 155 Mass. 21, 23; *supra*, § 100.

⁴⁶ *Trask v. Old Colony R. Co.*, 156 Mass. 298, 303. See, also, *Moynihan v. King's Windsor Cement D. M. Co.*, 168 Mass. 450, 452; *Riley v. Tucker* (Mass.) 60 N. E. 484. Ladders and stagings on which plumber's assistant worked not within act.

⁴⁷ *Jones v. Burford*, 1 Times Law R. 137.

⁴⁸ *Carter v. Clarke*, 78 Law T. (N. S.) 76, 14 Times Law R. 172. See *Allmarch v. Walker* (March 28, 1885) 78 Law T. 391; *Robinson v. Watson*, 20 Rottie, Ct. Sess. Cas. (4th Ser.) 144.

tracks of another. In a case where the defendant company and another railroad connected and shifted cars from one track to the other for their mutual accommodation in taking and leaving cars, it was held that the portion of the track of the other road used occasionally by the defendant for this purpose did not become a part of its ways. "The character of the business transacted is to be considered, and it would be unreasonable to hold that each company was bound to leave and take cars at the precise point of connection, at peril, if it did not do so, of making the track of the other part of its ways, works, and machinery, and of becoming liable for injuries resulting from any defect in it."⁴⁹ It has also been held, by a divided court, that a spur track owned, maintained, and repaired by a manufacturing company over which the defendant railroad delivers freight to the company under a contract with it is not a part of the ways of the railroad. "We think that neither the language of the statute nor good sense would permit us to hold an employer liable under the act for defects which he cannot help, in a place out of his control, to which his employes once in a while may be called for a few minutes. It will be understood that our view by no means requires ownership as a condition of the defendant's liability."⁵⁰

Foreign cars.

At common law, a railroad is bound to ship over its

⁴⁹ *Trask v. Old Colony R. Co.*, 156 Mass. 298, 304.

⁵⁰ *Engel v. New York, P. & B. R. Co.*, 160 Mass. 260, 261. Where plaintiff knew the defective track was leased by his master, he may nevertheless have an action against his master for failure to provide a safe place to work. *Story v. Concord & M. R. R.* (N. H.) 48 Atl. 288.

road the cars owned by other companies; but since the railroad was not concerned in their construction it is not held liable for defects in them. The company must, however, provide for the inspection of such cars when they are received, and take reasonable precautions to protect its employes from the dangers discovered in them.⁵¹ The duty cast upon the company is the same as that imposed upon a master who furnishes for his servants' use materials or machinery obtained in the market from reputable dealers. The distinction is that a foreign car is not adopted by the company as its own, and therefore it has been suggested that the act in making such cars a part of the ways, works, and machinery of the railroad has extended the common-law rule.

Under the act it was held that an empty foreign car placed in a train for the purpose of being returned to its owner was not a part of the ways, works, and machinery,⁵² but that a loaded car coming from another road, and being hauled over a part of the defendant's railroad for the transportation of freight in the due course of the defendant's business, was a part of the railroad's ways, works, and machinery. "For the time being, they were used in the defendant's business as a part of its rolling stock. The fact that the defendant did not own them is immaterial. The defendant was not bound to use them in its train if on inspection they were found to be unsafe."⁵³

⁵¹ *Mackin v. Boston & A. Railroad*, 135 Mass. 201; *Keith v. New Haven & N. Co.*, 140 Mass. 175; *Leazott v. Boston & M. R. Co.*, 70 N. H. 5. But where a business company uses a car which is furnished it by a railroad, it adopts it in its business, and becomes liable for defects in construction. *Spaulding v. Flynt Granite Co.*, 159 Mass. 587.

⁵² *Coffee v. New York, N. H. & H. R. Co.*, 155 Mass. 21.

⁵³ *Bowers v. Connecticut River R. Co.*, 162 Mass. 312, 317; *Louisville & N. R. Co. v. Davis*, 91 Ala. 487.

Since the decision of these cases, a statute in Massachusetts has provided that "a car which is in use by, or which is in the possession of, a railroad corporation, shall be considered as a part of the ways, works, or machinery of the corporation which uses or has it in possession, within the meaning of * * *, whether it is owned by such corporation or by some other company or person."⁵⁴

The master's responsibility covers only the period when the ways, etc., are so connected or used.

The ways, works, or machinery must have been adopted by the master as part of his permanent or *quasi* permanent arrangements. Before they have become such a part, or after they have ceased to be such a part, they do not come within the meaning of the act.

"We are constrained to come to the conclusion that the legislature, in saying, 'defects in the condition of the * * * works * * * connected with or used in the business of the employer,' did not mean 'about to be' connected or 'about to be' used. * * * I do not think section 1, subsec. 1, was intended to apply to a case where machinery, etc., was brought into a place intended to be used, and left so insecure that it fell."⁵⁵

Where the defendants, who were contractors, erected a building, and placed in it a flight of movable steps, and several months afterwards they were again employed by the owner to do some work in the building, it was held that they were not liable, under the act, to a servant who was injured by the steps slipping from

⁵⁴ Rev. Laws Mass. c. 106, § 71 (Acts Mass. 1893, c. 359, § 1).

⁵⁵ *Howe v. Finch*, 17 Q. B. Div. 187, 189.

under him, since they did not adopt this flight of stairs as a way used in their business.⁵⁶

§ 43. Ways, etc., in process of construction or destruction.

Works in process of construction or destruction are not part of the "ways, works, or machinery connected with or used in the business of the employer."

In England, a distinction has been taken in the case of works being constructed or destroyed, whether they are the "works" of the owner or of the contractor employed by him to do the work; and it is held in the latter case that they are part of the ways, works, or machinery of the contractor. In the case of *Howe v. Finch*⁵⁷ the plaintiff was injured by the fall of a wall being built upon the premises of the defendant by a contractor, and sued the owner by whom he was employed. The court held that the wall was not a part of the ways, works, or machinery of the owner. "Damage by the fall of a wall in the course of erection cannot be spoken of as arising from a defect 'in works' actually occupied or actually used for the purpose of business." In the later case of *Brannigan v. Robinson*⁵⁸ a wall was being pulled down by a contractor, and, because it was insecurely supported, fell upon the plaintiff while he was clearing away debris. The plaintiff sued the contractor by whom he was employed, and it was held that he could recover under the act. "I cannot see why premises which are in the possession of a person for the purposes

⁵⁶ *Regan v. Donovan*, 159 Mass. 1.

⁵⁷ 17 Q. B. Div. 187, 189; *Conway v. Clemence*, 2 Times Law R. 80 (well hole in house building).

⁵⁸ [1892] 1 Q. B. 344, 347. See, also, *Moore v. Gimson*, 58 Law J. Q. B. Div. 169; *Reynolds v. Holloway*, 14 Times Law R. 551; *Nordheimer v. Alexander*, 19 Can. Sup. Ct. 248.

of his business should not be regarded as the works of such person, so long as he is carrying on his business there. The case of *Howe v. Finch* is not in any way inconsistent with our judgment, for in that case the employer who was sued was not the builder but the owner of the premises, and the wall, being still in an unfinished state, and in the possession of the builder at the time of the accident, could not have been said to be connected with or used in the business of the employer."

These cases were considered by the Massachusetts court upon the question whether "the liability of a bank of earth, upon which laborers employed by a person are at work, to fall when undermined when not shored up, can be said to be a 'defect in the condition of the ways, works, or machinery connected with or used in the business of the employer,' * * * when the work on the bank is simply the leveling it for the purpose of grading the land of a third person." The plaintiff was employed by and sued the contractor, and it was held that this was a work of a temporary character, and not within the meaning of the act. "The reasoning in the case of *Branigan v. Robinson*, relied upon by the plaintiff, does not seem to us to be in accord with the earlier decision of the same court in *Howe v. Finch*, or with the later decision of the court of appeal in *Willetts v. Watt* [1892; 2 Q.B. 92], or with our own decisions, and we cannot follow it."⁵⁹ The rule was again stated in a case where the plaintiff was injured by falling through a well hole in a house being built by a contractor. The contractor had

⁵⁹ *Lynch v. Allyn*, 160 Mass. 248, 252, 253. See *Conroy v. Inhabitants of Clinton*, 158 Mass. 318,—*quaere* whether sewer trench is part of the works of the city building it; *Booker v. Higgs*, 3 Times Law R. 618, where plaintiff picked hole in wall, which fell.

cut the hole, but the plaintiff was employed by and sued a subcontractor. It was said: "We think that the building was not 'ways, works, or machinery * * *' of the defendant, and that therefore the hole did not constitute a defect in the ways, works, or machinery of the defendant. * * * When completed, the building would no doubt constitute a part of the ways, works, or machinery of the Lyman Mills, for which it was being erected, but while in the process of erection it could not be said, we think, to be a part of the ways, works, or machinery of a subcontractor who was helping to build it."⁶⁰

That the defect is of a temporary character does not imply that the place or machine in which it arises is not a part of the "ways, works, or machinery"; as, for example, in the case of *Willetts v. Watt*, above cited, the floor in which the catchpit was placed was clearly a "way," yet the alleged defect was a temporary use of it. The more accurate ground for the decision of the Massachusetts courts is that the words "ways, works, or machinery" refer to the places, implements, or means of accomplishing the object of a person's business, and not to the results of the business. It is true that a building in course of erection is, in a sense, "connected with or used in the business," yet it is as much the result of the builder's business as the yard of cloth is the result of a manufacturer's business, and it is not a place or machine necessary to the accomplishment of some other result.

In the same line are found the cases where the progress of the work gives rise to dangerous conditions.

⁶⁰ *Belque v. Hosmer*, 169 Mass. 541.

They are steps towards the accomplishment of the purpose of the business, and not means by which it is accomplished. Thus, the presence of unexploded dynamite cartridges in a ledge which is being destroyed are not within the act. "This was merely a condition of the material upon which the employes were working, caused by their work, and necessarily incident to the business in which they were engaged. It was in no proper sense a defect in the ways, works, or machinery of the defendant."⁶¹

§ 44. Ways, etc., must be furnished by master.

Only such tools and implements are "connected with and used in the business of the employer" as are furnished by him or by his authority for his servant's use.

And of these only such come within the definition of "ways, works, or machinery" as are a part of his permanent arrangements, and not of a nature to be consumed in the use.

A master is bound to furnish his servants with a sufficient supply of proper tools, appliances, and materials, and, having done so, he may safely leave the proper use of them to the servants themselves.⁶² But he is not responsible for the condition or use of the things he does not provide. "A master thus employing servants to do a certain work, and to furnish the tools and other appliances necessary for the prosecution of the work, is responsible to a fellow servant only for care in the selection of the men thus employed. He is not

⁶¹ *Welch v. Grace*, 167 Mass. 590, 592. See, where plaintiff is sent to clear out a room shattered by explosion, *Kanz v. Page*, 168 Mass. 217. See, also, staging cases *infra*, § 46. See *infra*, §§ 90, 91, dangers incidental to the business; §§ 95, 112.

⁶² *Allen v. Smith Iron Co.*, 160 Mass. 557; *McIntyre v. Boston & M. R. R.*, 163 Mass. 189; *Birmingham F. & M. Co. v. Gross*, 97 Ala. 220, 229. See *supra*, § 41, notes 44, 46.

responsible for a defective ax, rope, or trowel so furnished, which, in the hands and under the control of one of his servants, injures a fellow servant, any more than he is responsible to his servant for the careless and negligent manner in which such tool or appliance is used by a fellow servant. Suppose a carpenter and plumber are engaged in the common employment of making repairs, each bringing, as is usual in such cases, his own tools, the master would not be liable for an injury to the carpenter caused by a defect in the furnace of the plumber. Two woodmen are employed to cut down trees, and they both bring their own axes. It could not be contended, if one is injured by a defect in the ax of the other, that the master would be responsible."⁶³

The words of the act, "ways, works, or machinery," do not in terms include the infinite variety of small tools, appliances, and instrumentalities used in the business and furnished by the employer.⁶⁴ Such articles do not come within the fair meaning of the words, which refer rather to the more permanent arrangements of the employer and to the complicated mechanical devices used in his business, defects in which he may more readily discover and remedy, and the dangers of which arise rather from their nature than from the use made of them. There is no mystery in the construction or use of a hammer, and any defect in it or danger arising from it may be more effectually guarded against by the servant than by the master.⁶⁵

⁶³ *Harkins v. Standard Sugar Refinery*, 122 Mass. 400, 404.

⁶⁴ As to the effect of the word "plant," see *infra*, § 48. See, also, the Indiana act, *infra*, § 48.

⁶⁵ Wire marker in rope, *Carbury v. Downing*, 154 Mass. 248; *mov-*

Articles which are consumed during the progress of the work are not parts of the ways, works, or machinery. Thus, a dynamite exploder was held "not a part of the defendant's ways, works, and machinery, within the meaning of the law, but was only an article of merchandise which was bought to be used and instantly consumed in producing an explosion."⁶⁶

It would seem, therefore, that the failure on the part of a master to furnish a sufficient supply of proper tools and appliances, although a cause of action at common law, does not, under the act, constitute a "defect in the condition of the ways, works, or machinery connected with or used in business of the employer." Such failure, however, might come within the definition of a defective "plant."

§ 45. Ways.

A "way" is the course ordinarily taken by a servant to go from one part of his employer's premises to another when the business of the employer requires him to do so.

"'Way' means, not a right of way, not the right to walk up and down on this race, but it means a thing,—something which is the property of the employer, which it is his duty to find and use, or which he does in any way use in the business. Here the word 'way' means a material thing which may be used within or used in connection with the business of the employer."⁶⁷ A

able truck, *O'Keefe v. Brownell*, 156 Mass. 133, and *supra*, § 39, note 29; wooden lever, *Allen v. Smith Iron Co.*, 160 Mass. 557; spliced ladders, *McKay v. Hand*, 168 Mass. 270; hammer, *Georgia Pac. Ry. Co. v. Brooks*, 84 Ala. 138; rope, *Southern Ry. Co. v. Moore* (Ala.) 29 So. 659; steel bar, *Clements v. Alabama G. S. R. Co.* (Ala.) 28 So. 643; wrench, *Garnett v. Phoenix Bridge Co.*, 98 Fed. 192.

⁶⁶ *Supra*, § 41, note 44; *Shea v. Wellington*, 163 Mass. 364, 369.

⁶⁷ *McGiffin v. Palmer's S. & I. Co.*, 10 Q. B. Div. 5, 8.

better definition is found in a later case: "The course which a workman would in ordinary circumstances take in order to go from one part of a shop, where a part of the business is done, to another part where business is done, when the business of the employer requires him to do so, must be regarded as a 'way,' within the meaning of the statute."⁶⁸ In this case the "way" was merely the floor of a shop over which the servants passed in any direction, save as it was obstructed by machines or materials.

An eight-inch plank laid across rafters over which the plaintiff had to pass,⁶⁹ and a plank over a hole across which the plaintiff walked,⁷⁰ are "ways." Even the roof of a mine,⁷¹ or manholes along the side of a way in a mine,⁷² come within the term. The tracks of a railroad⁷³ or stagings may be "ways."

To permit a recovery under the act, it must appear that the "way" was one subject to the master's control, and which he had adopted and used in his business, and that the alleged defect was one which affected the quality and condition of the way itself. Obstacles lying on the way are not defects in its condition.⁷⁴ Examples of "defects in the condition of ways," etc., are collected below.⁷⁵

⁶⁸ *Willetts v. Watt* [1892] 2 Q. B. 92, 98; *Dolphin v. Plumley*, 167 Mass. 167.

⁶⁹ *United States R. S. Co. v. Weir*, 96 Ala. 396.

⁷⁰ *Bromley v. Cavendish Spinning Co.*, 2 Times Law R. 881.

⁷¹ *Woods v. Carron Iron Co.*, 8 Times Law R. 376.

⁷² *Ferris v. Cowdenbeath Coal Co.*, 24 Rettle, Ct. Sess. Cas. (4th Ser.) 615.

⁷³ *Supra*, § 42; *infra*, note 90.

⁷⁴ *Supra*, §§ 39-43.

⁷⁵ Trap doors in "ways" not defects generally, *Gray v. Thomson*, 17 Rettle, Ct. Sess. Cas. (4th Ser.) 200; *Moore v. Ross*, 17 Rettle, Ct.

§ 46. Works.

"Works" includes the structures and buildings employed in the prosecution of the master's business.

"Works" is defined as "an establishment for manufacturing or for performing industrial labor of any sort, * * * including all the buildings, machines,

Sess. Cas. (4th Ser.) 796; Forsyth v. Ramage, 18 Rettie, Ct. Sess. Cas. (4th Ser.) 21; Willetts v. Watt [1892] 2 Q. B. 92; Dolphin v. Plumley, 167 Mass. 167. At common law, see Young v. Miller, 167 Mass. 224; Hogarth v. Pocasset Mfg. Co., 167 Mass. 225; Anthony v. Leeret, 105 N. Y. 591. Vats near runway not a defect, Thomas v. Quartermaine, 18 Q. B. Div. 685; Carrigan v. Washburn & M. Mfg. Co., 170 Mass. 79. Railroad track, Pryor v. Louisville & N. R. Co., 90 Ala. 32 (hole); Kansas City, M. & B. R. Co. v. Webb, 97 Ala. 157 (discontinued switch spreading rails); Davis v. Miller, 109 Ala. 589; Louisville & N. R. Co. v. Stutts, 105 Ala. 368 (stop block on trestle); Alabama G. S. R. Co. v. Bailey, 112 Ala. 167 (rotten cross ties); Gustafsen v. Washburn & M. Mfg. Co., 153 Mass. 468 (ditch); Gleason v. New York & N. E. R. Co., 159 Mass. 68 (hole in planking); Maher v. Boston & A. R. Co., 158 Mass. 36 (absence of telltales at bridge). Objects near track, Mitchell v. Coats I. & S. Co., 23 Scot. Law R. 108 (iron bar); Wilson v. Louisville & N. R. Co., 85 Ala. 269 (water tank); Highland Ave. & B. R. Co. v. Walters, 91 Ala. 435 (coal); Georgia Pac. Ry. Co. v. Davis, 92 Ala. 300 (stone); East Tennessee, V. & G. R. Co. v. Thompson, 94 Ala. 636 (pipe on water tank); Kansas City, M. & B. R. Co. v. Burton, 97 Ala. 240 (car on siding); Hall v. Union Pac. Ry. Co., 16 Fed. 744 (telegraph pole); New York, N. H. & H. R. Co. v. O'Leary (C. C. A.) 93 Fed. 737 (guy rope); Babcock v. Old Colony R. Co., 150 Mass. 467 (pile of sleepers); Thompson v. Boston & M. R. Co., 153 Mass. 391 (pile of rails). Absence of railings, Wood v. Dorrall, 2 Times Law R. 550 (staircase); Ayres v. Bull, 5 Times Law R. 202 (ladder); Gill v. Thornycroft, 10 Times Law R. 316 (gang plank); O'Maley v. South Boston Gas Light Co., 158 Mass. 135; Carrigan v. Washburn & M. Mfg. Co., 170 Mass. 79 (runway). Whether ice on way is a defect, see McGiffin v. Palmer's S. & I. Co., 10 Q. B. Div. 5; Murray v. Knight, 156 Mass. 518. Narrowness of way may be a defect, McNamara v. Logan, 100 Ala. 187. Unsound bridge, Smith v. Lafons (July 22, 1882) 73 Law T. 220; loose plank falling from runway, Etherington v. Harrison (Dec. 31 1881) 72 Law T. 157; floor patched with blocks, Bowie v. Rankin. (226)

etc., used in the required operations.”⁷⁶ As used in the act in connection with other words, it is rather to be confined to the buildings, places, and structures used in the business.

It has been noted that buildings in process of construction or destruction are not a part of the builder’s “works.”⁷⁷ The stagings and scaffolds which are erected from time to time are not part of the “works” unless they are of a permanent nature and used for other purposes than the particular one for which they are built. The liability of a master for a defective staging at common law is well stated in the case of *Brady v. Norcross*.⁷⁸ “As this was a temporary staging, intended to be used only in finishing the room where it was constructed, if the plaintiff’s employers furnished sufficient quantities of suitable materials for staging, employed suitable workmen, and did not themselves undertake the duty of furnishing the staging as a structure, but only of supplying materials and labor by which it might be built and from time to time adapted to the work, and if the duty of furnishing or adapting the staging as an appliance for use in the work * * * was intrusted to or assumed by the workmen themselves, within the scope of their employment, the employers are not answerable to the plaintiff for his injury.”⁷⁹ On the

13 *Rettie*, Ct. Sess. Cas. (4th Ser.) 981; plank over hole gave way, *Bromley v. Cavendish Spinning Co.*, 2 *Times Law R.* 881. See, also, *infra*, § 95.

⁷⁶ Cent. Dict.

⁷⁷ *Supra*, § 43.

⁷⁸ 172 *Mass.* 331, 332, 174 *Mass.* 442.

⁷⁹ Citing *Kelley v. Norcross*, 121 *Mass.* 508; *Colton v. Richards*, 123 *Mass.* 484; *Killea v. Faxon*, 125 *Mass.* 485; *Clark v. Soule*, 137 *Mass.* 380; *Hoppin v. City of Worcester*, 140 *Mass.* 222; *Kennedy v. Spring*,

other hand, if the staging was furnished by the employers as a completed structure, or if they themselves supervised and directed its construction, or if, relying upon its construction by their workmen for themselves, the employers negligently failed to provide suitable and sufficient materials, or negligently hired incompetent workmen, the employers might be answerable to the plaintiff."⁸⁰

Under the act, a temporary staging erected by the workmen themselves for the immediate purpose is not a part of the master's works.⁸¹ Nor would it seem that a staging erected by the master himself for a temporary purpose comes within the act. Where, however, the staging acquires such a degree of permanence that it is a means of carrying on the business, and not merely an incident in the accomplishment of a particular work, it becomes a part of the ways. Thus, a staging is within the act, which was "erected by the side of a wood pile for the purpose of enabling the workmen to pile the wood higher. It was about fifteen feet high, twenty feet long, and five feet wide, and it was taken down and put up from time to time in different places, and was intended to be used from four days to a week at a time in each place where it was erected."⁸²

160 Mass. 203; *Kalleck v. Deering*, 169 Mass. 200. See, also, *Arnold v. Eastman Freight Car Heater Co.*, 176 Mass. 135; *O'Connor v. Rich*, 164 Mass. 560.

⁸⁰ Citing *Arkerson v. Dennison*, 117 Mass. 407; *Mulchey v. Methodist Religious Soc.*, 125 Mass. 487; *Clark v. Soule*, 137 Mass. 380; *Twomey v. Swift*, 163 Mass. 273. See, also, *Elmer v. Locke*, 135 Mass. 575.

⁸¹ *O'Connor v. Neal*, 153 Mass. 281; *Burns v. Washburn*, 160 Mass. 457; *Carroll v. Willcutt*, 163 Mass. 221; *Adasken v. Gilbert*, 165 Mass. 443; *Reynolds v. Barnard*, 168 Mass. 226; *Thomson v. Dick*, 19 *Ret. Ct. Sess. Cas.* (4th Ser.) 804.

⁸² *Prendible v. Connecticut River Mfg. Co.*, 160 Mass. 131; *Huxam* (228)

It is still an open question whether such conditions as darkness, heat, cold, or unhealthful circumstances can be regarded as defects, within the meaning of the act. Where these are the necessary or existing conditions of the business at the time of making the contract of service, the employe assumes the risk of them, and as they are obvious dangers, easily avoided, it will usually be found that the servant was negligent in encountering them. The few cases at common law which have considered this question go off on one or the other of these grounds, although they contain statements that the employer owes no duty to light his premises.⁸³ It is believed that such conditions come within the fair meaning of the word "works" or "plant," and that a failure to use reasonable care in regard to them may constitute a defect within the act.

Cases of defects in the condition of the "works" are collected below.⁸⁴

§ 47. Machinery.

"Machinery" includes all mechanical contrivances used to effect a certain result by means of a force other than the direct muscular strength of the operator, or by utilizing his muscular strength in an indirect manner.

"The term 'machinery' embraces all the parts and

v. Thoms (Jan. 28, 1882) 72 Law T. 227; Batchelor v. Tilbury (Aug. 12, 1882) 73 Law T. 271. See, also, Drommie v. Hogan, 153 Mass. 29; McLean v. Cole, 175 Mass. 5.

⁸³ Robertson v. Adamson, 24 Ct. Sess. Cas. (2d Ser.) 1231; Wilkinson v. Fairrie, 1 Hurl. & C. 633; Seymour v. Maddox, 16 Q. B. 326; Kaare v. Troy Steel & Iron Co., 139 N. Y. 369; Carrigan v. Washburn & M. Mfg. Co., 170 Mass. 79.

⁸⁴ Low bridge, Schlaff v. Louisville & N. R. Co., 100 Ala. 377; Louisville & N. R. Co. v. Banks, 104 Ala. 508. A roof that fails to bear the weight of snow may be defective. Dolan v. Alley, 153 Mass. 380. Wooden awning projecting from station is not a defect. Fisk v. Fitchburg R. Co., 158 Mass. 238. See, also, *infra*, § 95.

instruments intended to be and actually operated, from time to time, exclusively by force created and applied by mechanical apparatus or contrivance, though the initial force may be produced by the muscular strength of men or animals, or by water or steam, or other inanimate agency."⁸⁵ By another definition the term includes "every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result."⁸⁶ It does not include tools or appliances "disconnected from any other mechanical appliances, and operated simply by muscular strength directly applied."⁸⁷

The machinery must have become a part of the permanent or *quasi* permanent arrangements of the employer, and have been adopted or used by him in his business.⁸⁸ Machinery which has been brought into a mill, but not yet set up, does not come within the act.⁸⁹ Thus, whether a derrick used in the master's business becomes a part of the ways, works, or machinery depends upon whether it is rigged for a temporary purpose or becomes part of the permanent arrangements of the work.⁹⁰

It has already been noted that there may be a defect

⁸⁵ *Georgia Pac. Ry. Co. v. Brooks*, 84 Ala. 138.

⁸⁶ *Corning v. Burden*, 15 How. (U. S.) 252, 267.

⁸⁷ *Georgia Pac. Ry. Co. v. Brooks*, 84 Ala. 138; *supra*, § 44.

⁸⁸ *Supra*, §§ 42, 44.

⁸⁹ *Howe v. Finch*, 17 Q. B. Div. 187.

⁹⁰ "For the time being, and with respect to workmen employed in cutting stone near it, the derrick was a piece of machinery, part of the fitting up of a stone yard, as the stage used in building piles of wood was part of the fitting up of a wood yard in *Prendible v. Connecticut River Mfg. Co.*, 160 Mass. 131, 139, rather than an appliance to be put together and set up and moved from place to place by workmen who were using it, as was the derrick in *McGinty v.* (230)

in the condition of a machine, arising not only from a want of perfectness or repair, but also because it is unsuitable for the purpose to which the master intends it to be put.⁹¹ Cases of defective machinery are collected in the notes.⁹²

Athol Reservoir Co., 155 Mass. 183, 187." *McMahon v. McHale*, 174 Mass. 320, 324.

A movable truck that is fitted to tracks and used for transporting heavy articles is part of the ways, works, and machinery. *Gunn v. New York, N. H. & H. R. Co.*, 171 Mass. 417; *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202. See, also, *O'Keefe v. Brownell*, 156 Mass. 131.

⁹¹ *Supra*, §§ 39-41.

⁹² *Cars*, *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211 (hand hold); *Louisville & N. R. Co. v. Campbell*, 97 Ala. 147 (brake rod); *Perdue v. Louisville & N. R. Co.*, 100 Ala. 535 (brake); *Louisville & N. R. Co. v. Binion*, 98 Ala. 570, 107 Ala. 645 (brake); *Campbell v. Louisville & N. R. Co.*, 109 Ala. 520 (brake rod); *Coffee v. New York, N. H. & H. R. Co.*, 155 Mass. 21 (brake); *Spaulding v. Flynt Granite Co.*, 159 Mass. 587 (brake); *Memphis & C. R. Co. v. Graham*, 94 Ala. 545 (drawhead); *East Tennessee, V. & G. Ry. Co. v. Turvaville*, 97 Ala. 122 (unequal height of drawbars); *Louisville & N. R. Co. v. Boland*, 96 Ala. 626 (unequal height of drawbars); *Boland v. Louisville & N. R. Co.*, 106 Ala. 641 (unequal height of drawbars); *Bowers v. Connecticut River R. Co.*, 162 Mass. 312 (unequal height of drawbars); *Ellsbury v. New York, N. H. & H. R. Co.*, 172 Mass. 130 (unequal height of drawbars); *Louisville & N. R. Co. v. Baker*, 106 Ala. 624 (coupling); *Pryor v. Louisville & N. R. Co.*, 90 Ala. 32 (coupling link). See *Thyng v. Fitchburg R. Co.*, 156 Mass. 13 (coupling pin). *Locomotives*, *Tennessee C., I. & R. Co. v. Kyle*, 93 Ala. 1 (no cowcatcher); *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143 (leaky throttle valve); *Culver v. Alabama Midland Ry. Co.*, 108 Ala. 330 (falling of scraper from engine); *Bridges v. Tennessee C., I. & R. Co.*, 109 Ala. 287 (boiler); *Highland Ave. & B. R. Co. v. Miller*, 120 Ala. 535 (means of controlling engine). *Switch*, *Birmingham Ry. & E. Co. v. Allen*, 99 Ala. 359; *Chambliss v. Mary Lee C. & R. Co.*, 104 Ala. 655. *Signals*, *Brouillette v. Connecticut River R. Co.*, 162 Mass. 198 (wires on rails). *Electricity*, *Willey v. Boston Electric Light Co.*, 168 Mass. 40 (insulation burned off wire). *Absence of guards*, *Ten-*

§ 48. Plant.

"Plant" comprises whatever apparatus, fixtures, or tools a master uses in his business.

"Plant," in its ordinary sense, includes whatever apparatus is used by a business man for carrying on his business,—not his stock in trade, which he buys or makes for sale, but all goods or chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business."⁹³ Another court defines the word as meaning "the fixtures and tools necessary to carry on any trade or mechanical business."⁹⁴ This word is used in addition to "ways," "works," and "ma-

nessee C., I. & R. Co. v. Herndon, 100 Ala. 451 (safety chains on pots removing waste); Claxton v. Mowlem, 4 Times Law R. 756 (no safety clutch on bucket hook); Dolan v. Atwater, 167 Mass. 274 (loose latch on tub); Smith v. Harrison, 5 Times Law R. 406 (shuttle flying from loom); Tate v. Latham [1897] 1 Q. B. Div. 502 (circular saw); Corcoran v. East Surrey Ironworks Co., 5 Times Law R. 103 (guard on track); Heske v. Samuelson, 12 Q. B. Div. 30 (rail on elevator); Donahue v. Washburn & M. Mfg. Co., 169 Mass. 574 (set screw not a defect). Contra, O'Connor v. Hamilton Bridge Co., 25 Ont. 12. See, also, Cameron v. Walker, 35 Scot. Law R. 347 (unguarded cogs). See *supra*, § 39; *infra*, § 95. Falling objects, Graham v. Badger, 164 Mass. 42 (block from derrick); Copithorne v. Hardy, 173 Mass. 400 (shafting); McMahon v. McHale, 174 Mass. 320 (derrick). Explosions, Grimsley v. Hankins, 46 Fed. 400 (boiler); Bishop v. Brown, 14 Colo. App. 535 (boiler). Starting of machinery, Baxter v. Wyman, 4 Times Law R. 255; Pacon v. Dawes, 3 Times Law R. 557 (hydraulic crane). Miscellaneous, Thomas v. Great Western Colliery Co., 10 Times Law R. 244 (brake throwing sparks); Bacon v. Dawes, 3 Times Law R. 557 (hydraulic power on crane); Langham v. Young (July 30, 1881) 71 Law T. 232 (rope breaking); Whittaker v. Balmforth (Sept. 10, 1881) 71 Law T. 327 (eyebolt); Richmond & D. R. Co. v. Weems, 97 Ala. 270 (gudgeon pin of derrick); Tuck v. Louisville & N. R. Co., 98 Ala. 150 (absence of key to tail bolt). See, also, *supra*, §§ 39-41, 95.

⁹³ Yarmouth v. France, 19 Q. B. Div. 647, 658.

⁹⁴ Liberty County L. & L. Co. v. Barnes, 77 Ga. 748.

chinery" in the acts of England, Alabama, and Indiana.⁹⁵ In England and Scotland it has been held that a horse is part of the "plant," and his viciousness is a defect under the act.⁹⁶ Small tools and appliances are included within its meaning. Thus, a ladder used in an engine room, and not provided with hooks or stays, was held defective in England.⁹⁷ But in Alabama the word has not been given so wide a meaning, and a hammer is not within the definition.⁹⁸ The use of this term does, however, give a remedy for defects in many appliances which lie outside the phrase of "ways, works, and machinery," found in the Massachusetts and Colorado acts.⁹⁹ It sometimes is synonymous with "works," as where the giving way of the side of a coal bin was held a defect in the "plant."¹⁰⁰

"Tools."

The Indiana act also contains the word "tools," and this, without question, includes the small appliances, tools, etc., which are probably covered by the word "plant."¹⁰¹

§ 49. Negligence.

To give a cause of action under this statute there must be

⁹⁵ *Supra*, § 38.

⁹⁶ *Yarmouth v. France*, 19 Q. B. Div. 647; *Haston v. Edinburgh St. Tramways Co.*, 14 Rettie, Ct. Sess. Cas. (4th Ser.) 621; *Fraser v. Hood*, 15 Rettie, Ct. Sess. Cas. (4th Ser.) 178; *Wilson v. Boyle*, 17 Rettie, Ct. Sess. Cas. (4th Ser.) 62.

⁹⁷ *Weblin v. Ballard*, 17 Q. B. Div. 122; *Cripps v. Judge*, 13 Q. B. Div. 583.

⁹⁸ *Georgia Pac. Ry. Co. v. Brooks*, 84 Ala. 138.

⁹⁹ *Supra*, § 44.

¹⁰⁰ *Banks v. Murrell* (June 17, 1882) 73 Law T. 125; *Carter v. Clarke*, 78 Law T. (N. S.) 76, 14 Times Law R. 172 (gas in hold of ship exploded because unventilated). See, also, *infra*, § 95.

¹⁰¹ *Supra*, § 44.

negligence on the part of the employer or of some person for whose carelessness he is made liable.

The words of the act are, "which arose from or had not been discovered or remedied owing to the negligence."

Negligence on the part of the employer or of some one for whom he is responsible is the gist of any action brought under the clause now being considered or under any of the succeeding clauses. It is incumbent on the plaintiff to point out some fault of omission or of commission causing damage to him. Proof of a defect only is not sufficient. There must be evidence that it existed through negligence.¹⁰²

The act has not had the effect of making the employer an insurer,¹⁰³ and, if the injury happens through a pure accident, the employer, being not at fault, is not liable.¹⁰⁴

The defect must have arisen through his negligence, or must have been undiscovered or not remedied owing to his negligence. "Unless there had been a reasonable opportunity to effect a remedy, it could not be said that the failure to do so was negligent. The defendant must have had sufficient time to remedy the defect after its

¹⁰² *Walsh v. Whiteley*, 21 Q. B. Div. 371, 378; *Wilson v. Louisville & N. R. Co.*, 85 Ala. 269; *Louisville & N. R. Co. v. Davis*, 91 Ala. 487; *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 217; *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 137. The act does not permit evidence of subsequent precautions to be introduced to show negligence. *Hart v. Lancaster & Y. Ry. Co.*, 21 Law T. (N. S.) 261; *Shinners v. Proprietors of Locks and Canals*, 154 Mass. 168. Liable under act for wanton negligence, *Southern Ry. Co. v. Moore*, 29 So. 659.

¹⁰³ *Robins v. Cubitt*, 46 Law T. (N. S.) 535.

¹⁰⁴ *Callender v. Carlton Iron Co.*, 10 Times Law R. 366; *McQuade v. Dixon*, 24 Scot. Law R. 727; *Craven v. Mayers*, 165 Mass. 271. See *Girard v. Griswold*, 177 Mass. 57.

discovery, before it could be chargeable with negligence in failing to effect such remedy. Mere knowledge without the opportunity to act on it would not constitute negligence.¹⁰⁵

The extent to which a master must go in remedying the defect has been thus stated: "So, when the statute goes on to speak of the defect not having been remedied, it does not mean that the machine must have been made perfect for working purposes, but that its dangerous condition must have been ended. This may be done by a temporary device, as well as by permanent repairs. It was not necessary that the break in the insulation should have been discovered and mended, if, as was shown to be the fact, the danger could have been removed by easy and obvious means,—either those adopted or by a warning signal."¹⁰⁶

Negligence.

Actionable negligence is made up of three elements,—a legal duty owed by one person to another to use care commensurate with the circumstances not to injure him, a breach of that duty through failure to use such care, and damage proximately resulting from the breach.¹⁰⁷

The duty is not imposed by contract between the par-

¹⁰⁵ *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143, 147; *Kansas City, M. & B. R. Co. v. Webb*, 97 Ala. 157. The jury need not find how long the defect existed, if it existed long enough to establish the defendant's negligence. *Louisville & N. R. Co. v. Baker*, 106 Ala. 624.

¹⁰⁶ *Willey v. Boston Electric Light Co.*, 168 Mass. 40, 42.

¹⁰⁷ The classic definition of negligence is found in *Blyth v. Birmingham Waterworks*, 11 Exch. 781, 784: "Negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something a prudent man would not do." See *Jaggard, Torts*, § 246, note. See, also, *infra*, § 83.

ties, but is implied by law from the circumstances and relation in which they stand to each other. The measure of duty varies. Towards a stranger or trespasser the owner of premises owes a lesser duty than towards one whom he has invited upon them, and the duty which a carrier owes to its passengers for hire is greater still. It is considered that a servant, when upon his master's premises in the course of his employment, occupies the position of an invited person, and therefore is entitled to warning and protection against all the dangers which the master knows and which the servant does not know or appreciate. The distinction is brought out in a case where a person went to another's premises in search of work, and while there was injured by a defect in a machine which existed through the owner's negligence. It was held that the plaintiff was merely a licensee, to whom the master owed no duty to keep his machinery in repair;¹⁰⁸ but, had the plaintiff been a servant, there would have been such a duty, which might have been enforced.

Having established the duty between the parties, to give a cause of action it must appear that there has been a failure to perform it. The defendant is required to exercise such a degree of care as an ordinarily careful and prudent man would exercise in view of all the circumstances. The care is commensurate with the circumstances, and, where the duty imposes a high degree of care, a slight failure is a breach and is negligence. There are no degrees of negligence, though there are degrees of care. "Care and diligence should vary accord-

¹⁰⁸ *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391. See *Sweeny v. Old Colony & N. R. Co.*, 10 Allen (Mass.) 368; *supra*, § 2, note 83. (236)

ing to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which they are to be exerted.”¹⁰⁹ “We do not attribute much force to the argument that, by the use of the term ‘ordinary care’ in regard to the traveler, and ‘reasonable care’ in regard to the corporation, the judge intended to prescribe a higher kind or degree of care to be observed by the one than by the other. We are inclined to think that there was a variation in words only, and not in meaning. The true rule undoubtedly is that the degree and measure of care and capacity are precisely the same,—each is bound to take such care as men of ordinary sense, prudence and capacity would take under like circumstances in the conduct and management of their respective vehicles.”¹¹⁰

Negligence means inadvertence, and thus the phrase “willful negligence” is meaningless. It is a failure to pay attention, to take care, when there is a duty to do so, but it negatives the idea of an intention to do wrong. When there is no duty, or when the duty is fulfilled by the exercise of care commensurate with the circumstances, if an injury happen, there can be no recovery, since there is no negligence. Such an injury is an accident, and “to make an accident or casualty, or, as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency and in the circumstances in which he was placed.”¹¹¹

¹⁰⁹ *Fletcher v. Boston & M. R. R.*, 1 Allen (Mass.) 9, 15; *Toledo & W. Ry. Co. v. Goddard*, 25 Ind. 185; *supra*, § 37.

¹¹⁰ *Shaw v. Boston & W. R. Corp.*, 8 Gray (Mass.) 45, 78.

¹¹¹ *Brown v. Kendall*, 6 Cush. (Mass.) 292, 296.

The third element of actionable negligence is injury proximately caused by it, and, unless there be injury directly attributable to the breach of duty, there can be no recovery.¹¹²

The act has not changed the measure of duty imposed upon the master or the degree of care to be exercised by him in performing it. The decisions upon negligence at common law are therefore authorities upon questions arising under the act.¹¹³

§ 50. *Res ipsa loquitur*.

The maxim, "*Res ipsa loquitur*," has no application in actions for personal injuries brought by a servant against his master.

The plaintiff has the burden of showing by a fair preponderance of the evidence the existence of fault on the part of the defendant or his servants. This is a burden that remains upon him throughout the trial. Negligence is seldom capable of direct proof, but is an inference arising from all the facts. Since one of these facts is the occurrence of the accident, if it is of such a character that it would not ordinarily happen without the fault of some one, the plaintiff often seeks to rest his case merely upon proof of it, on the ground that *res ipsa loquitur*,—the happening of such an accident is itself evidence of negligence. This maxim states a rule of evidence. It does not mean that the accident is proof of the negligence sufficient to sustain the burden cast upon the plaintiff, but that it makes out a *prima facie* case which casts on the defendant the duty of explanation. If the defendant declines the duty, there is evidence of negligence on which a verdict for

¹¹² *Supra*, §§ 14, 15.

¹¹³ *Supra*, §§ 2, 38.

the plaintiff may be rendered, but, if the defendant explains, then the *prima facie* case of the plaintiff is met. He can no longer rely upon the maxim, and must offer other evidence of negligence to sustain his burden of proof.

The principle has been thus stated: In an action for personal injury caused by the alleged negligence of the defendant, the plaintiff must adduce reasonable evidence of negligence to warrant the judge in leaving the case to the jury, "but where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."¹¹⁴ The maxim was first applied, and is ordinarily applied, in cases where a stranger is injured by something happening on the defendant's premises, or where a stranger or a passenger is injured by the alleged negligence of a common carrier. It is applied only against one who is in control of the place or thing causing the injury,¹¹⁵ and the plaintiff must negative other causes than the probable negligence of the defendant.¹¹⁶ The maxim may be relied upon, therefore, when the injury is such a one as ordinarily would not happen if reasonable care were used, and the defendant who has the duty of using this care is in the management and control. Under such circumstances the jury are warranted in drawing the inference that,

¹¹⁴ *Scott v. London & St. K. Docks Co.*, 3 Hurl. & C. 596, 601.

¹¹⁵ *Cross v. Koster*, 17 App. Div. (N. Y.) 402, 405.

¹¹⁶ *Kendall v. City of Boston*, 118 Mass. 234.

if no other cause than the possible negligence of the defendant appear, it is probable that his negligence was the true cause, and if he does not choose to explain he must suffer the consequences.¹¹⁷

Such is the rule when injury happens to a stranger, but when the injury is suffered by a servant the maxim is less easy of application, and is sometimes said, indeed, to have no place in cases of this kind.

The mere happening of an accident is often evidence of a defect, even if it is not evidence of the defendant's negligence. "If an implement like this [an iron ladle], the breaking of which is attended with danger, breaks in the proper use of it for the purpose for which it was designed, it is some evidence that it is defective in the sense that at the time it is not safe or suitable for the use to which it is put. * * * Its use in its unsafe condition may or may not be due to the negligence of its owner."¹¹⁸

¹¹⁷ *Volkmar v. Manhattan Ry. Co.*, 134 N. Y. 418; *Magee v. City of Brooklyn*, 18 App. Div. (N. Y.) 22; *Huey v. Gahlenbeck*, 6 Am. St. Rep. 790, note, 121 Pa. 238; *Harbison v. Metropolitan R. Co.*, 9 App. D. C. 60, 67; *Transportation Co. v. Downer*, 11 Wall. (U. S.) 129, 134; *Inland Seaboard Coasting Co. v. Tolson*, 139 U. S. 555; *Carter v. Kansas City Cable Ry. Co.*, 42 Fed. 37; *Smith v. Georgia Pac. Ry. Co.*, 88 Ala. 538; *Wabash, St. L. & P. Ry. Co. v. Locke*, 112 Ind. 404; *Louisville, N. A. & C. Ry. Co. v. Snyder*, 117 Ind. 435; *Cleveland, C., C. & St. L. Ry. Co. v. Berry*, 152 Ind. 607; *Thomas v. Western Union Telegraph Co.*, 100 Mass. 156; *Feital v. Middlesex R. Co.*, 109 Mass. 398; *White v. Boston & A. R. Co.*, 144 Mass. 404; *Ugglav. West End St. Ry. Co.*, 160 Mass. 351; *Carmody v. Boston Gas Light Co.*, 162 Mass. 539; *Hicks v. New York, N. H. & H. R. Co.*, 164 Mass. 424; *Manning v. West End St. Ry. Co.*, 166 Mass. 230; *Gibson v. International Trust Co.*, 177 Mass. 100; *Carter v. Boston & A. R. Co.*, 177 Mass. 228; *Philadelphia, W. & B. R. Co. v. Anderson*, 20 Am. St. Rep. 490, note, 72 Md. 519. See *Cosulich v. Standard Oil Co.*, 122 N. Y. 118.

¹¹⁸ *Coleman v. Mechanics' Iron Foundry Co.*, 168 Mass. 254, 256; (240)

The Massachusetts court has said, in master and servant cases, that "the mere happening of an accident, if it is one that the exercise of ordinary care would commonly prevent, is some evidence of negligence."¹¹⁹ But it must appear that the accident points more probably to a cause for which the master is responsible than to any other cause;¹²⁰ and when such is the case the evidence need not show the impossibility of any other cause; the jury are to weigh these probabilities and decide.¹²¹ "We are not prepared to say that the jury were not warranted in finding that the defect which was shown to exist by the fall of the shafting presumably was due to the negligence of those who had charge of it. If the jury thought that such things generally can be prevented by reasonable care,—that as a rule they do not happen from latent defects, but rather because some one has been careless in failing to attach heavy machinery in such a way as to support its weight,—we cannot say that their judgment was not the result of experience, but a guess. The machinery had been up

Allen v. Smith Iron Co., 160 Mass. 557 (breaking of stick); *Drum v. New Eng. Cotton Yarn Co.* (Mass.) Dec. 21, 1901 (step ladder).

¹¹⁹ *Mahoney v. New York & N. E. R. Co.*, 160 Mass. 573, 579 (unloading bales); *Moynihan v. Hills Co.*, 146 Mass. 586 (machine); *Arkerson v. Dennison*, 117 Mass. 407; *Prendible v. Connecticut River Mfg. Co.*, 160 Mass. 131 (fall of staging); *Hennessy v. City of Boston*, 161 Mass. 502; *O'Neal v. O'Connell*, 167 Mass. 388 (trench caving). See *Jones v. Pacific Mills*, 176 Mass. 354 (breaking of ladder).

¹²⁰ *Blanchette v. Border City Mfg. Co.*, 143 Mass. 21 (starch blown from boiler); *Thyng v. Fitchburg R. Co.*, 156 Mass. 13, 19. See *Griffin v. Boston & A. R. Co.*, 148 Mass. 143 (train breaking apart); *Hale v. New York & N. E. R. Co.*, 174 Mass. 317 (explosion of boiler). See, also, *Duffy v. Upton*, 113 Mass. 544 (breaking of derrick).

¹²¹ *Griffin v. Boston & A. R. Co.*, 148 Mass. 143, 146; *White v. Boston & A. R. Co.*, 144 Mass. 404, 405.

before for a long time, in another part of the room, without falling. The question when the rule *res ipsa loquitur* can be applied with safety must be considered always with reference to the special facts of the case, and the teachings of experience with regard to them. General propositions and decisions upon different facts are equally useless."¹²²

¹²² Copithorne v. Hardy, 173 Mass. 400, 401. "Res ipsa loquitur, which is merely a short way of saying that, as far as the court can see, the jury, from their experience as men of the world, may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case. Presumptions of fact, or those general propositions of experience which form the major premises of particular conclusions of this sort, usually are for the jury. The court ordinarily confines itself to considering whether it can say there is no such presumption, or, in other words, that such accidents commonly are not due to negligence." Graham v. Badger, 164 Mass. 42, 47 (rope breaking).

In Neveu v. Sears, 155 Mass. 303, the defendant furnished a stone from his quarry, which was used in erecting a building where the plaintiff was at work. The plaintiff struck the stone, and it exploded. "Whether * * * the quarry men at the ledge were fellow servants with the plaintiff is a question upon which we express no opinion, * * * for the reason that the cause of action relied on was an alleged failure of the defendant to use reasonable care to provide safe materials for the plaintiff's work. If the defendant failed in that specific duty, it was immaterial to the case how the materials negligently furnished became dangerous. * * * It is not of the nature of stone to explode when struck. The accident itself established the fact that some other and explosive material was affected by the plaintiff's blow. It was competent for the jury to find from the evidence that no explosive was placed there by the teamster, or by the other mason who handled the stone, or by the superintendent, or purposely by any one. We cannot, as matter of law, say that it was not a reasonable inference that a dynamite cartridge, placed in a drill hole in the ledge in the process of quarry-

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The view taken in the United States courts is thus expressed: "First. That while, in the case of a passenger, the fact of an accident carries with it a presumption of negligence on the part of the carrier,—a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely,—* * * a different rule obtains as to an employe. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence. * * * Second. That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, * * * it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."¹²³

ing, remained in the stone and was exploded by the plaintiff's blow, nor that such was not the inference most consistent with the evidence."

¹²³ *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 663 (step of engine turned); *Peirce v. Kile* (C. C. A.) 80 Fed. 865 (breaking of rope). See *Westland v. Gold Coin Mines Co.* (C. C. A.) 101 Fed. 59, 65 (fall of staging); *The William Branfoot* (C. C. A.) 52 Fed. 392 (fall of stanchion); *In re California, N. & G. Co.*, 110 Fed. 670; *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418 (starting of machinery).

"The burden of proof in this case is on the plaintiff to prove negligence; and this is not shifted by proving only the fact of injury

The difference in the views of these jurisdictions is one of expression rather than of substance. The use of the maxim, *res ipsa loquitur*, which has a well-understood meaning in carrier cases, where it is ordinarily found, does not aid the decision of cases where a servant sues his master. When an accident that commonly may be prevented by the use of care happens to a passenger on a railroad, the probability is that it happens through negligence, and through negligence for which the defendant is responsible, since from the nature of the duty cast upon him the question which of his servants was negligent or the history of the accident is immaterial upon his liability. When such an accident happens to a servant, although there is the same probability that it happens through negligence, yet before a breach of the master's duty appears there are other probabilities, which the fact of the accident raises, that must be con-

from the explosion of the boiler. Such is the rule where an employe or servant sues, although a different principle is held to prevail where an injury is received by a passenger on a railroad in consequence of a defect in any of its machinery or appliances." *Louisville & N. R. Co. v. Allen's Adm'r*, 78 Ala. 494, 503; *Louisville & N. R. Co. v. Campbell*, 97 Ala. 147, 151 (brake); *Tuck v. Louisville & N. R. Co.*, 98 Ala. 150 (parting of train); *Louisville & N. R. Co. v. Binion*, 107 Ala. 645 (brake). See *Tennessee C., I. & R. Co. v. Hayes*, 97 Ala. 201, 207 (moving car).

"It must be conceded negligence was not established by proof of the accident. The happening of an accident does not establish negligence as against the company, and in favor of the employe, whatever the rule may be in actions brought by injured passengers. It was not one of those peculiar accidents concerning which the railroad company has special knowledge, and where the burden of proof might be shifted when the evidence once established the occurrence." *Denver & R. G. R. Co. v. McComas*, 7 Colo. App. 121, 123 (rock on track); *Bishop v. Brown*, 14 Colo. App. 535 (explosion of boiler); *infra*, § 54.

sidered. It may have happened through a latent defect, through a risk assumed, through the negligence of a fellow servant, and for none of these is the defendant answerable. Thus, the plaintiff cannot show a breach of duty until these other probabilities are denied, and it is only when he has negatived them that he stands, as it were, in the position of a stranger, and may say that the fact of accident is some evidence of negligence. The defendant's negligence is, then, the only probability remaining, and, in the absence of explanation, is enough to support the plaintiff's verdict. The maxim expresses no peculiar rule, for in any case a jury find a verdict upon the balance of probabilities, and to state this as a rule leads to confusion.

In passing upon the question of the existence of evidence upon which a plaintiff may go to the jury, the court finds difficulty in saying whether a given accident is of such a nature that reasonable men would, from their experience, infer that it was caused from lack of care. In order to rest merely upon proof of the accident without other evidence of negligence, a plaintiff must be certain that the every-day experience of men finds such accidents resulting from negligence. The court will not send a case to a jury where it believes such is not the common experience.

§ 51. Statutory enactments.

The violation by an employer of a statute passed for the protection of his employes is admissible evidence on the question of his negligence, if the violation contributed to the injury.

Although such a statute imposes a penalty upon the employer, the employe may have an action under it, if the pur-

pose of its enactment is to protect or benefit a class of persons.

When a statute or municipal ordinance imposes a duty upon a defendant, and through a violation of it injury is proximately caused to a stranger, evidence of this violation may be introduced upon the question of the defendant's negligence; and the better opinion is that such violation is *prima facie*, and not conclusive, evidence of negligence.¹²⁴ When the plaintiff is a servant, it would seem that the same principle should apply.¹²⁵

The nature and purpose of the statute determines the question whether a violation of it subjects the defendant to a criminal prosecution, to an action by the person injured, or to both. The provision for penalty in case of violation is not conclusive. If the statute is for the

¹²⁴ Wright v. Malden & M. R. Co., 4 Allen (Mass.) 283; Lane v. Atlantic Works, 111 Mass. 136; Hanlon v. South Boston H. R. Co., 129 Mass. 310; Newcomb v. Boston Protective Department, 146 Mass. 596; Van Norden v. Robinson, 45 Hun (N. Y.) 567; McRickard v. Flint, 114 N. Y. 222; Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488; McCambley v. Staten I. M. R. Co., 32 App. Div. (N. Y.) 346; Hayes v. Michigan Cent. R. Co., 111 U. S. 228; Union Pac. Ry. Co. v. McDonald, 152 U. S. 262; Blamires v. Lancashire & Y. Ry. Co., L. R. 8 Exch. 283. In Indiana, Alabama, and Colorado it is conclusive evidence of negligence. Pennsylvania Co. v. Hensil, 70 Ind. 569; Indiana, B. & W. Ry. Co. v. Barnhart, 115 Ind. 399; Pennsylvania Co. v. Horton, 132 Ind. 189; Gothard v. Alabama G. S. R. Co., 67 Ala. 115; South & North A. R. Co. v. Donovan, 84 Ala. 141; Western Ry. v. Sistrunk, 85 Ala. 352; Platte & D. C. & M. Co. v. Dowell, 17 Colo. 376. See Sess. Laws Colo. 1897, c. 69; Narramore v. Cleveland, C., C. & St. L. Ry. Co. (C. C. A.) 96 Fed. 298.

¹²⁵ Baddeley v. Earl Granville, 19 Q. B. Div. 423; Coe v. Platt, 6 Exch. 752, 757; Cooke v. Lalance Grosjean Mfg. Co., 33 Hun (N. Y.) 351; Gorman v. McArdle, 67 Hun (N. Y.) 484. See Turner v. Boston & M. R. R., 158 Mass. 261. Failure to comply with the statute is *per se* evidence of negligence. Thompson v. Wright, 22 Ont. 127. See Groves v. Wimborne [1898] 2 Q. B. 402.

benefit of the public at large, and in the nature of a general police regulation, a violation of it is not a cause of action by the person injured.¹²⁶ But when the violation creates a nuisance,¹²⁷ or the statute has been enacted for the benefit and protection of a class of persons, a private action will lie, although a criminal prosecution might also be instituted.¹²⁸ Of this latter class of statutes are those relating to the regulation and conduct of particular businesses, of the employment of women and children, of the guarding of elevators, fencing of dangerous machinery, and the like.¹²⁹ Under the factory and workshop act in England it was held after debate that the servant injured by a violation of its provisions might maintain an action, although a penalty was imposed on the employer. "The owners of the factory are at fault for not having this shaft securely fenced, and are *prima facie* liable in damages for the consequences of that fault, for I cannot adopt the view that their liability is limited to the penalty imposed by the statute for the neglect of its provisions. I think that the neglect of the statutory provisions creates a *prima facie* case of fault against the factory

¹²⁶ *Gorris v. Scott*, L. R. 9 Exch. 125; *Clegg v. Earby Gas Co.* [1896] 1 Q. B. 592; *Kirby v. Boylston Market Ass'n*, 14 Gray (Mass.) 249.

¹²⁷ *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Salisbury v. Herchenroder*, 106 Mass. 458; *Quinn v. Lowell Electric Light Corp.*, 140 Mass. 106.

¹²⁸ *Groves v. Wimborne* [1898] 2 Q. B. 402; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228; *Parker v. Barnard*, 135 Mass. 116.

¹²⁹ Coal Mines Regulation Act (50 & 51 Vict. c. 58); Factory & Workshop Act (41 & 42 Vict. c. 16; 58 & 59 Vict. c. 37); Sess. Laws Colo. 1897, c. 69; Acts Ind. 1897, c. 65; Acts Ind. 1899, c. 142; Rev. Laws Mass. c. 104, §§ 4-8, 22-28, 40-44; Id. c. 105; Id. c. 106; §§ 19-24, 28, 29, 41-43; Id. c. 111, §§ 183, 201-209.

owners, which will render them liable in damages to their employes who may have been injured through that fault."¹³⁰ And a later case went further in saying that, where "there has been a failure in the performance of an absolute statutory duty, there is no need for the plaintiff to allege or prove negligence on the part of any one in order to make out his cause of action."¹³¹ In Massachusetts the point has not been decided,¹³² but the weight of authority in the United States agrees with the English view.¹³³

When the breach of a statutory obligation gives a right of action, the plaintiff is not relieved of the necessity of showing his freedom from contributory negligence,¹³⁴ and, if he goes to work in a place where the

¹³⁰ *Kelly v. Glebe Sugar Refining Co.*, 20 Rettle, Ct. Sess. Cas. (4th Ser.) 833.

¹³¹ *Groves v. Wimborne* [1898] 2 Q. B. 402. See, also, *Gibb v. Crombie*, 2 Rettle, Ct. Sess. Cas. (4th Ser.) 886; *Gray v. Thomson*, 17 Rettle, Ct. Sess. Cas. (4th Ser.) 200; *Couch v. Steel*, 3 El. & Bl. 402; *Holmes v. Clarke*, 6 Hurl. & N. 349; *Clarke v. Holmes*, 7 Hurl. & N. 937; *Atkinson v. Newcastle & G. W. Co.*, 2 Exch. Div. 441; *Britton v. Great Western Cotton Co.*, L. R. 7 Exch. 130.

¹³² *Foley v. Pettee Machine Works*, 149 Mass. 294.

¹³³ *Hickey v. Taaffe*, 32 Hun, 7, 99 N. Y. 204; *Cobb v. Welcher*, 75 Hun (N. Y.) 283; *Knisley v. Pratt*, 75 Hun (N. Y.) 323; *Stewart v. Ferguson*, 34 App. Div. (N. Y.) 515; *Narramore v. Cleveland, C., C. & St. L. Ry. Co. (C. C. A.)* 96 Fed. 298; *Klatt v. N. C. Foster Lumber Co.*, 97 Wis. 641.

There is some conflict whether statutes requiring warning signals or fencing tracks apply to servants. Do not apply to servants, *Carper v. Recelvers of Norfolk & W. R. Co. (C. C. A.)* 78 Fed. 94; *Wright v. Southern Ry. Co.*, 80 Fed. 260; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478; *Louisville & N. R. Co. v. Markee*, 103 Ala. 160. Do apply, *East St. Louis Connecting Ry. Co. v. Eggmann*, 71 Ill. App. 32; *Illinois Cent. R. Co. v. Gilbert*, 157 Ill. 354.

¹³⁴ *Groves v. Wimborne* [1898] 2 Q. B. 402; *Taylor v. Carew Mfg. Co.*, 143 Mass. 470; *Matta v. Chicago & W. M. Ry. Co.*, 69 Mich. 109; (248)

statute is violated, he waives the protection of the statute, and assumes the risk of injury.¹³⁵ But some courts have held that an agreement, express or implied, to waive the performance of a statutory duty of the master, imposed for the protection of the servant and in the interest of the public, and enforceable by criminal prosecution, will not be sustained, and that, therefore, the servant does not assume the risk of injury;¹³⁶ and certain statutes themselves provide that the risk shall not be assumed.¹³⁷ When action is brought by the servant for the neglect of a statutory duty whereby he is injured, the fellow-servant defense is not available.¹³⁸

§ 52. Negligence of the employer.

The act permits suit for the personal negligence of the employer in regard to the ways, works, or machinery.

The clause under consideration is the only one in the act which gives a remedy for the personal negligence

St. Louis & S. E. Ry. Co. v. Mathias, 50 Ind. 65; *Dieboldt v. United States Baking Co.*, 72 Hun (N. Y.) 403; *Bodell v. Brazil Block Coal Co.*, 25 Ind. App. 654; *Lake Erie & W. Ry. Co. v. Craig* (C. C. A.) 73 Fed. 642; *Cleveland, C., C. & St. L. Ry. Co. v. Baker* (C. C. A.) 91 Fed. 224; *Narramore v. Cleveland, C., C. & St. L. Ry. Co.* (C. C. A.) 96 Fed. 298; *Victor Coal Co. v. Muir*, 20 Colo. 320; *Gibb v. Crombie*, 2 Rettle, Ct. Sess. Cas. (4th Ser.) 886; *infra*, § 116.

¹³⁵ *Holmes v. Clarke*, 6 Hurl. & N. 349; *Clarke v. Holmes*, 7 Hurl. & N. 937; *De Young v. Irving*, 5 App. Div. (N. Y.) 499; *Stewart v. Ferguson*, 34 App. Div. (N. Y.) 515; *Knisley v. Pratt*, 148 N. Y. 372; *E. S. Higgins Carpet Co. v. O'Keefe* (C. C. A.) 79 Fed. 900; *Keenan v. Edison Electric Illuminating Co.*, 159 Mass. 379; notes, 48 L. R. A. 68, 96; *infra*, § 116.

¹³⁶ *Narramore v. Cleveland, C., C. & St. L. Ry. Co.* (C. C. A.) 96 Fed. 298; *Simpson v. New York Rubber Co.*, 80 Hun (N. Y.) 415; *Baddeley v. Earl Granville*, 19 Q. B. Div. 423.

¹³⁷ Acts Mass. 1895, c. 362, § 7; Rev. Laws Mass. c. 111, § 209.

¹³⁸ *Groves v. Wimborne* [1898] 2 Q. B. 402; *Kelly v. Glebe Sugar*

of the master. At common law there was a remedy for his negligence, and the insertion of this provision has caused some speculation in England. It has been suggested that the reason was to be found in the limited jurisdiction of the English county courts,¹³⁹ or that it "was specially designed to prevent the master's plea that the workman was working in face of a known danger being entertained in actions laid on the statute, where the injured man knew the master was in the knowledge of the defect which brought about the accident, and where the negligence on the employer's part in not seeing to the remedying such defect is proved or admitted."¹⁴⁰

The American cases do not consider that these words add anything to the master's liability.¹⁴¹ "By the negligence of the employer we understand to be intended his own negligence, in distinction from that of his servant or superintendent, which is included in the latter part of the same sentence in which the negligence of the employe is spoken of."¹⁴²

§ 53. Negligence of a person intrusted.

The act permits recovery for the negligence of a servant of the employer who is intrusted by him with the duty of seeing that the ways, works, machinery, or plant is in proper condition.

The insertion in this clause of the words "of some

Refining Co., 20 Rettie, Ct. Sess. Cas. (4th Ser.) 833; *Baltimore & O. S. W. Ry. Co. v. Peterson (Ind.)* 59 N. E. 1044.

¹³⁹ *Roberts & Wallace, Employ. Liab.* (3d Ed.) p. 208.

¹⁴⁰ *Spens & Younger, Pers. Inj.* p. 184.

¹⁴¹ *Supra*, § 38.

¹⁴² *Toomey v. Donovan*, 158 Mass. 232, 236.

person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition," greatly extended the liability of an employer in England, but did not affect his liability in the United States. The words are aptly chosen to describe a servant who at common law was charged by the master with the performance of his personal duty in regard to the furnishing and maintenance of plant and machinery in a fit condition for the work required of them. Whether such a servant was at common law a fellow servant of the party injured depended upon the character of his duties, and the same test defines whether or not he comes within this clause of the act.¹⁴³

As the statute expressly provides, the person intrusted with the duty must be in the service or a servant of the employer, but an independent contractor may perform duties which bring him within this description.¹⁴⁴

He must also be intrusted with the duty by the employer. Whether or not he is so intrusted is an inference arising from the facts and the character of his acts. It must appear that a duty was cast upon the employer to see that his ways, works, or machinery were in proper condition; else the person attending to them will not come within the clause. Thus, where the condition of a machine as to safety is constantly changing with its use, so as to require from the persons tending it, as a part of the ordinary use of it, reconstruction or readjustment of parts, as they become worn out or displaced, from materials or new parts supplied by the

¹⁴³ *Supra*, §§ 37, 38.

¹⁴⁴ *Toomey v. Donovan*, 158 Mass. 232.

master for that purpose, such work is part of the regular business of the servant in using the machine, and not of the master in maintaining it, and negligence in doing it is, as to all other employes, negligence of a fellow servant.¹⁴⁵ Such is the rule at common law, and it is believed that the act has not brought such servants within its provisions, so as to charge the master with their negligence.¹⁴⁶

It must appear that it was the business of the servant to attend to the duty, and the mere fact that during the progress of the work he may incidentally have something to do in regard to the ways, works, or machinery is not enough. "The laborer cannot, in any fair view of the statute, be said to have been a person intrusted by the defendants with the duty of seeing that the ways or works were in proper condition. At the most, he was there only as an assistant to the plaintiff, to aid him in moving from window to window the planks and barrels, and placing them where the plaintiff's work required them to be. For aught that appears, the plaintiff had as much to say as the laborer, if not more, as to where the barrels should stand, and how the planks should be placed upon them, although it was customary for the laborer or helper to do the actual work of placing and moving. The statute does not apply to a mere laborer working under or with others, even though it may be a part of his duty, at some particular moment in the progress of the work, to look after and attend to

¹⁴⁵ *Moynihan v. Hills Co.*, 146 Mass. 586; *McGee v. Boston Cordage Co.*, 139 Mass. 445; *Bjbjian v. Woonsocket Rubber Co.*, 164 Mass. 214; *McMahon v. McHale*, 174 Mass. 320.

¹⁴⁶ *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 195.

certain instrumentalities.”¹⁴⁷ An English case which states that a workman who had requested a guard for a circular saw to be made, and who then negligently left it off, might be a person intrusted, etc., goes rather further than the American cases, and would not be followed.¹⁴⁸

The person contemplated by the clause is not necessarily clothed with authority, but one whose chief business it is to attend to this duty. A servant who in all his acts and duties is a fellow servant, but upon one or two occasions has attended to the condition of a machine, would not ordinarily come within the definition unless upon those occasions he was clearly intrusted with the work by the master. “S. [the superintendent] had the wider authority, no doubt, but was a salesman, and the man who really understood the machinery and looked after it, although subject to orders, was M. [a carpenter who put up the shafting which fell]. The jury were warranted in finding that he was a person intrusted, within the meaning of the statute.”¹⁴⁹ “If cutting the wires was the proper thing for the defendant to do, it was M.’s business to do it. He was employed to find trouble where there was any, and to remedy it if he could.”¹⁵⁰

¹⁴⁷ O’Connor v. Neal, 153 Mass. 281, 283.

¹⁴⁸ Tate v. Latham [1897] 1 Q. B. 502.

¹⁴⁹ Copithorne v. Hardy, 173 Mass. 400, 402.

¹⁵⁰ Willey v. Boston Electric Light Co., 168 Mass. 40, 42 (night lineman); Kansas City, M. & B. R. Co. v. Webb, 97 Ala. 157; Alabama G. S. R. Co. v. Davis, 119 Ala. 572 (section foreman); Yarmouth v. France, 19 Q. B. Div. 647 (hostler); Bowers v. Connecticut River R. Co., 162 Mass. 312 (car inspector).

A watchman who, by harbor regulations, is to protect open deck holes is not within act. Gray v. Thomson, 17 Rettle, Ct. Sess. Cas.

If the servant injured is also the person intrusted with the duty, he cannot, of course, recover.¹⁵¹

§ 54. Court or jury.

It is the duty of the court to state and define the issues which the plaintiff must prove in order to recover, and then upon a view of all the evidence to determine whether reasonable men might think that the facts and inferences of fact appearing came within the definitions and rules of law laid down by it.

If different conclusions might reasonably be reached, the evidence must be submitted to the jury, who are to pass upon the weight of it, and decide whether the plaintiff has established his case.

The plaintiff must, by a preponderance of the evidence, sustain each of the propositions necessary to fix the defendant with responsibility. Under this clause of the act he must allege and prove the existence of a defect, the negligence of the employer, or of a servant intrusted by him, with regard to it, and that it was the proximate cause of the injury suffered by him.¹⁵² Each of these propositions has been defined by the court, and there must be evidence tending to bring the plaintiff's case under each of the definitions.

When the evidence is all offered, whether it comes from the plaintiff's side alone, or from the defendant's also, the court must, as a preliminary question, decide

(4th Ser.) 200. Conductor or brakeman is not. *Memphis & C. R. Co. v. Graham*, 94 Ala. 545.

¹⁵¹ *Birmingham Furnace & Mfg. Co. v. Gross*, 97 Ala. 220.

¹⁵² *Whitcomb v. Standard Oil Co.*, 153 Ind. 513; *Memphis & C. R. Co. v. Askew*, 90 Ala. 5; *Pryor v. Louisville & N. R. Co.*, 90 Ala. 32; *Mary Lee C. & R. Co. v. Chambliss*, 97 Ala. 171; *Tuck v. Louisville & N. R. Co.*, 98 Ala. 150; *Davis v. Miller*, 109 Ala. 589.

whether the facts and the inferences to be drawn from them might lead reasonable men to believe that all of the material propositions had been maintained. If the court thinks that reasonable men must come to the conclusion that any one of these propositions is not supported, the plaintiff fails. The court passes upon the existence, not the weight, of evidence, and if a conflict of inferences or of facts appears, either in the evidence offered by the plaintiff only or by the evidence offered by the defendant, the jury must pass upon it.

“The question of negligence is generally, though not always, a question for the jury. Negligence is not a fact which is the subject of direct proof, but it is an inference from facts put in evidence. Witnesses testify to the facts of the case, from which negligence, if there is any, is inferred. This inference is usually within the province of the jury. * * * When a case involving a charge of negligence is concluded by the presentation of the evidence, there is a preliminary question for the court. The court is to decide whether such evidence has been presented as makes it proper to submit the case to the jury. It is only when the facts are such that all reasonable men must draw the same conclusions from them that the question of negligence becomes one of law for the court. * * * When evidence is offered which, if true, would constitute negligence, and it is controverted by other material evidence, the case is one for the jury. When there is evidence tending to show negligence which is not controverted, but from which different inferences could be fairly drawn, the case should be submitted to the jury. The case is for the jury, of course, when the facts are left in doubt, and

the inferences to be drawn from them are uncertain, and might fairly lead different minds to different conclusions."¹⁵³ "The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred. The jurors have to say whether

¹⁵³ *McGhee v. Campbell* (C. C. A.) 101 Fed. 936, 940.

"If the evidence, in the most favorable light in which it may be reasonably considered in behalf of the plaintiff, does not show, nor tend to show, the defendant guilty of the negligence causing the injury as alleged in the complaint, then the court may properly grant a nonsuit, or direct a verdict in favor of the defendant; but if there be testimony even of a single witness, or facts and circumstances properly shown in evidence by different witnesses, from which the jury may reasonably draw an inference of negligence, even though there be contradictory testimony by plaintiff's own witnesses bearing upon the question of negligence, then such question should be submitted to the jury under proper instructions. * * * Where there is no conflict in the testimony bearing upon the subject either of negligence or contributory negligence, the court may, in a clear case, treat the question as one of law and grant a nonsuit or direct a verdict; but where the determination of the question depends upon the inference to be drawn from a variety of facts and circumstances, in the consideration of which there is room for a substantial difference of opinion between intelligent and upright men, then the question should be submitted to the jury under appropriate instructions, even though there be no conflict in the testimony." *Lord v. Pueblo S. & R. Co.*, 12 Colo. 390, 392; *Posten v. Denver Consolidated Tramway Co.*, 11 Colo. App. 187.

"Where the whole evidence introduced by the plaintiff, if believed by the jury, is so insufficient to support a verdict that the court would not permit one to stand, it is the duty of the court to instruct the jury, as matter of law, that there is not sufficient evidence to warrant a verdict for the plaintiff. But where the evidence is conflicting, and the testimony of one or more witnesses, if thought by the jury to be credible and accurate, would, taken by itself, support a verdict, the case cannot be taken from the jury; for the court cannot adjudge, as matter of law, that one witness, or set of witnesses, is to be believed rather than another. That question is not of law, but of fact, and can only be entertained upon a motion for a new trial on the ground that the verdict is against the weight of (256)

from these facts, when submitted to them, negligence ought to be inferred."¹⁵⁴

The court is therefore called upon to decide what inferences are legitimate, and "to answer this question the court refers to its own knowledge of the ordinary course of events so far as to consider whether it can say that there is no probability or presumption of fact that when facts A and B exist, of which there is direct evidence, fact C also exists by way of cause, effect, or concomitant. If it cannot, then it leaves it to the jury to say whether, according to their experience, there is such a probability or presumption."¹⁵⁵

The plaintiff is therefore required to introduce evidence from which the court may say that negligence on the part of the defendant may be inferred, though he is not required to point out the particular act or omission which caused the accident.¹⁵⁶ His evidence cannot be purely conjectural. "The cause relied on has to be set

evidence." *Reed v. Inhabitants of Deerfield*, 8 Allen (Mass.) 522, 524.

See, also, *Dublin, W. & W. Ry. Co. v. Slattery*, 3 App. Cas. 1155; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 472; *Richmond & D. R. Co. v. Powers*, 149 U. S. 43; *Elliott v. Chicago, M. & St. P. Ry. Co.*, 150 U. S. 245; *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658; *Mau v. Morse*, 3 Colo. App. 359; *Louisville & N. R. Co. v. Allen's Adm'r*, 78 Ala. 494; *Birmingham M. R. Co. v. Wilmer*, 97 Ala. 165; *Tennessee C., I. & R. Co. v. Herndon*, 100 Ala. 451; *Baltimore & O. & C. R. Co. v. Walborn*, 127 Ind. 142; *Reynolds v. Barnard*, 168 Mass. 226; *infra*, § 118.

¹⁵⁴ *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193, 197; *Wabash, St. L. & P. Ry. Co. v. Locke*, 112 Ind. 404; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478.

¹⁵⁵ *Doyle v. Boston & A. R. Co.*, 145 Mass. 386, 387; *Graham v. Badger*, 164 Mass. 42, 47. See *supra*, § 50.

¹⁵⁶ *Mooney v. Connecticut River Lumber Co.*, 154 Mass. 407; *Bivins v. Georgia Pac. Ry. Co.*, 96 Ala. 325.

against the total of other possible causes. We cannot admit that common experience may have furnished the jury with *data* as to the relative frequency of the different chances sufficient to enable them to pronounce a rational determination."¹⁵⁷ But on the other hand he is not required to prove negligence beyond a doubt.¹⁵⁸

Evidence of the defendant's negligence is not sufficient to permit the plaintiff to go to the jury unless it is connected with the injury;¹⁵⁹ and in all cases it must appear that the defendant's negligence was the proximate cause of the injury sustained.¹⁶⁰

¹⁵⁷ *Clare v. New York & N. E. R. Co.*, 167 Mass. 39, 40; *Irwin v. Alley*, 158 Mass. 249; *Felt v. Boston & M. R. R.*, 161 Mass. 311; *Murphy v. Boston & A. R. Co.*, 167 Mass. 64; *Dewhirst v. Boston & M. R. R.*, 167 Mass. 402; *Bromley v. Birmingham M. R. Co.*, 95 Ala. 397; *Mary Lee C. & R. Co. v. Chambliss*, 97 Ala. 171. "Evidence which merely raises a suspicion, or a surmise, or a conjecture, is not enough to be entitled to be submitted to the jury." *Hillyer v. Dickinson*, 154 Mass. 502, 504.

¹⁵⁸ *Griffin v. Boston & A. R. Co.*, 148 Mass. 143.

¹⁵⁹ *Wakelin v. London & S. W. Ry. Co.*, 12 App. Cas. 41.

¹⁶⁰ *Supra*, §§ 14, 15; *Martin v. Connah's Q. A. Co.*, 33 Wkly. Rep. 216; *Colorado C. & I. Co. v. Lamb*, 6 Colo. App. 255; *Burlington & M. R. R. Co. v. Budin*, 6 Colo. App. 275; *Thompson v. Louisville & N. R. Co.*, 91 Ala. 496; *Louisville & N. R. Co. v. Binion*, 98 Ala. 570; *Drommie v. Hogan*, 153 Mass. 29; *Brady v. Ludlow Mfg. Co.*, 154 Mass. 468.

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CHAPTER V.

SUPERINTENDENCE.

- § 55. Fellow Servants.
- 56. Effect of Clause.
- 57. Superintendent a Servant Intrusted with Duty.
- 58. "Superintendence."
- 59. "Any Superintendence."
- 60. "Sole or Principal Duty."
- 61. Need not Superintend Plaintiff.
- 62. While in Exercise of Superintendence.
- 63. Negligence of Superintendent.

§ 55. Fellow servants.

At common law, he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the perils arising from the carelessness and negligence of those who are in the same employment.

The rule above stated is found in the opinion of Chief Justice Shaw in the case of *Farwell v. Boston & W. R. Corp.*,¹ and announces the principle which, with varying degrees of strictness, has been followed in all jurisdictions. In actions by a servant against his master to recover for an injury received through the negligence of another servant in the same employment, the ordinary doctrines of agency which would hold the master answerable to a stranger are not applied, and the reasons given are that the servant, upon entrance into the employment, impliedly agrees with

¹ 4 Metc. (Mass.) 49, 57.

the master to take the risk. It is said that the rate of compensation is commensurate with the risk, and that the servant, being in a better position than the master to observe the conduct of those with whom he works, is better able to protect himself from the consequences of their negligence. The rule is really one of policy, and rests upon the consideration that, if the master were held to the same measure of liability to his servant that he is to a stranger, the conduct of business enterprises would be practically impossible. There is in it also the notion that the servant becomes in some way identified with the business and undertaking of the master. That the rule is a harsh one cannot be denied, and its operation has been limited by courts and legislatures.²

Taken in its strictness, the master is bound only to use reasonable care to hire and retain in his service employes competent to do the work required, and to employ a sufficient number of them for the purposes of his business. If a servant is negligent, and it can be shown that the master failed to use due care in hiring him or retaining him after he knew or ought to have known of his incompetence, in all jurisdictions the master is answerable.³ But if the servant is competent, and injures the plaintiff through his negligence, there is no liability.

The authorities are conflicting in the extent and definition of the rule. It is essential that the injured and

² *Supra*, § 1.

³ *Skipp v. Eastern Counties Ry. Co.*, 9 Exch. 223; *Gilman v. Eastern R. Co.*, 10 Allen (Mass.) 233, 13 Allen, 433; *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198, 202; *Moss v. Pacific R. Co.*, 49 Mo. 167; *infra*, § 89.

the negligent servant should be in the same or the common employment. These terms have been defined in the opinion of Shaw, C. J., to be: "When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source."⁴ In the same opinion it is also said: "It would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise how near or how distant must they be, to be in the same or different departments." The difficulty suggested has not been found insuperable, and several of the states have applied what is termed the "different department theory." "The doctrine rests upon the theory that the vast extent of the business of railway companies has led to the division of their business into separate and distinct departments; that by reason of this division a servant in one branch or department has no sort of association or connection with one in another department; that this absence of association gives such servant no opportunity of observing the character of a servant in another department of labor, and no opportunity to guard against the negligence of such servant. The want of consociation is the idea underlying this limitation."⁵

⁴ Farwell v. Boston & W. R. Corp., 4 Metc. (Mass.) 49, 60.

⁵ Coal Creek Min. Co. v. Davis, 90 Tenn. 711. This rule is adopted in Georgia, Kentucky, Illinois, and Tennessee, and has been recognized in Missouri, West Virginia, Utah, Arizona, and Nebraska. It was at first adopted in Indiana, but later repudiated. Slattery's

Whether Shaw's rule of "common employment" or the "different department limitation" be adopted, the meaning of "fellow servants" has been still further defined, and the authorities may be grouped into three general classes: First, those holding that all who serve a common master are fellow servants, for whose negligence the master is not responsible, without regard to the rank or authority of the negligent servant or the duties which he performs. Second, those holding that servants intrusted with some measure of control and authority by the master are his agents, for whose acts he is answerable. This is known as the "superior servant limitation." Third, those holding that, where the master delegates the performance of duties which he is personally bound to his servants to perform to agents, the latter are his "vice principals," and in so far as they are intrusted with these duties they are not fellow servants, and the master is responsible for their negligence.

England is the only jurisdiction which has applied the first of these rules.⁶ It has not been adopted in the United States. The last rule—the "vice-principal theory"—is the one generally enforced in the several states. Thus, the common law of Massachusetts, Alabama, and Indiana holds that all who derive their authority and compensation from the same source are fellow servants in the common employment, for whose negligence the master is not responsible unless he has delegated to them the performance of some of his personal duties. The

Adm'r v. Toledo & W. Ry. Co., 23 Ind. 81; Columbus & I. C. Ry. Co. v. Arnold, 31 Ind. 174; Gormley v. Ohio & M. Ry. Co., 72 Ind. 31.

⁶ Priestley v. Fowler, 3 Mees. & W. 1; Bartonshill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266; Wilson v. Merry, L. R. 1 H. L. Sc. 326. (262)

test is the character of the act, and not the grade or rank in the service, of the negligent servant, or the measure of authority with which he may be invested. Since a master is personally bound to all his servants to provide and maintain reasonably safe machinery and works, to hire and retain competent servants, and to instruct or warn those entering his employment, he cannot, by intrusting or delegating the performance of these obligations to agents, escape the responsibility for their negligence in executing them.⁷

⁷ In Massachusetts, the entire or different department theory is rejected. *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49; *Albro v. Agawam Canal Co.*, 6 Cush. (Mass.) 75; *Holden v. Fitchburg R. Co.*, 129 Mass. 268. It is of no importance whether the negligent servant is of a superior grade, or intrusted with authority. *Albro v. Agawam Canal Co.*, 6 Cush. (Mass.) 75; *Holden v. Fitchburg R. Co.*, 129 Mass. 268. But if the negligent servant is intrusted with the performance of duties personal to the master, the latter is responsible. *Ford v. Fitchburg R. Co.*, 110 Mass. 240. The performance of the ordinary daily repairs incident to the operation of a machine is not a personal duty of the master. *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209; *McGee v. Boston Cordage Co.*, 139 Mass. 445. See, also, *Gilman v. Eastern R. Co.*, 10 Allen (Mass.) 233, 13 Allen, 433; *Summersell v. Fish*, 117 Mass. 312; *Hodgkins v. Eastern R. Co.*, 119 Mass. 419; *O'Connor v. Roberts*, 120 Mass. 227; *Zeigler v. Day*, 123 Mass. 152; *Walker v. Boston & M. R. R.*, 128 Mass. 8; *Floyd v. Sugden*, 134 Mass. 563; *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198; *Moynihan v. Hills Co.*, 146 Mass. 586; *McKinnon v. Norcross*, 148 Mass. 533; *Howard v. Hood*, 155 Mass. 391; *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70; *O'Brien v. Rideout*, 161 Mass. 170; *Kalleck v. Deering*, 161 Mass. 469; *Wosbigian v. Washburn & M. Mfg. Co.*, 167 Mass. 20.

In Alabama, the different department theory is not adopted. *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672. The superiority of the negligent servant is immaterial. *Mobile & M. Ry. Co. v. Smith*, 59 Ala. 245. If the negligent servant is intrusted with a duty personal to the master, the latter is liable. *Walker v. Bolling* 22 Ala. 294; *Smoot v. Mobile & M. Ry. Co.*, 67 Ala. 13. See, also, *Cook*

The decisions in Colorado are conflicting, but it is believed that the weight of authority has adopted the rule of the states just cited, with the qualification that, if the negligent servant is placed in charge of an entire and distinct department of the work, the master is liable for his negligence.⁸

In the United States courts, the decision in the case of *Chicago, M. & St. P. Ry. Co. v. Ross* gave countenance to the "superior servant limitation"; but the subsequent cases have weakened its authority, and it may be said that the United States courts apply the "vice-principal

v. Parham, 24 Ala. 21; *Tyson v. South & North A. R. Co.*, 61 Ala. 554; *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300.

In Indiana, although the different department theory is rejected, it is said that one to whom the control of an entire department is intrusted is a "vice-principal," for whose negligence the master is liable. *Taylor v. Evansville & T. H. R. Co.*, 121 Ind. 124; *Nall v. Louisville, N. A. & C. Ry. Co.*, 129 Ind. 268; *Hoosier Stone Co. v. McCain*, 133 Ind. 231. Compare *Slattery's Adm'r v. Toledo & W. Ry. Co.*, 23 Ind. 81; *Columbus & I. C. Ry. Co. v. Arnold*, 31 Ind. 174; *Gormley v. Ohio & M. Ry. Co.*, 72 Ind. 31. Mere superiority in rank does not charge the master with liability. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Pittsburg, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151; *Taylor v. Evansville & T. H. R. Co.*, 121 Ind. 124. If the negligent servant is intrusted with the performance of a duty personal to the master, the latter is answerable. *Columbus & I. C. Ry. Co. v. Arnold*, 31 Ind. 174; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Neutz v. Jackson Hill C. & C. Co.*, 139 Ind. 411; *New Pittsburg C. & C. Co. v. Peterson*, 136 Ind. 398, 14 Ind. App. 634.

⁸ *Denver S. P. & P. R. Co. v. Driscoll*, 12 Colo. 520; *Colorado M. Ry. Co. v. Naylor*, 17 Colo. 501; *Deep Mining & Drainage Co. v. Fitzgerald*, 21 Colo. 533; *Denver & Rio Grande R. Co. v. Sipes*, 23 Colo. 226; *Denver Tramway Co. v. Crumbaugh*, 23 Colo. 363; *Lantry v. Silverman*, 1 Colo. App. 404; *Acme Coal Min. Co. v. McIvor*, 5 Colo. App. 267. A dictum in *Colorado Milling & Elevator Co. v. Mitchell*, 26 Colo. 284, apparently recognizes the superior servant theory.

theory," and also hold that, if the negligent servant is intrusted with the charge and control of an entire and separate department of the business, the master is answerable for his acts,⁹

§ 56. Effect of clause.

The effect of the act is to except from the class of fellow servants, the risk of whose negligence the servant was held to have assumed, such persons as are intrusted by the master with duties of superintendence while in the exercise of them.

The provision which is found in the acts of England, Massachusetts, Alabama, and Colorado,¹⁰ that when a servant is injured by reason of the negligence of any person in the service of the employer, intrusted with

⁹ *Hough v. Railway Co.*, 100 U. S. 213; *Chicago, M. & St. P. Ry. Co. v. Ross*, 112 U. S. 377; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368; *Union Pac. Ry. Co. v. Daniels*, 152 U. S. 684; *Northern Pac. R. Co. v. Hambley*, 154 U. S. 349; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72; *Central R. Co. v. Keegan*, 160 U. S. 259; *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346; *Northern Pac. R. Co. v. Charless*, 162 U. S. 359; *Martin v. Atchison, T. & S. F. R. Co.*, 166 U. S. 399; *Alaska Min. Co. v. Whelan*, 168 U. S. 86; *New England R. Co. v. Conroy*, 175 U. S. 323.

¹⁰ 43 & 44 Vict. c. 42, § 1, cl. 2: "By reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence."

Section 8. "The expression 'person who has superintendence intrusted to him' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor."

Rev. Laws Mass. c. 106, § 71: "The negligence of a person in the service of the employer who was intrusted with and was exercising superintendence, and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person

and exercising superintendence, he shall have the same rights as if he were a stranger, removes the special defense which the master had at common law,—that the negligent and injured servants were fellow servants, and consequently the master was not liable. It is an adoption of the “superior-servant theory.”¹¹

The extent to which this provision affects the master's liability depends, of course, upon the state of the common law in the jurisdiction. In England, where the master escaped liability for the negligence of any servant, in whatever capacity he acted, the change was more radical than in Massachusetts or the other states, where the master was already responsible for the negligence of a servant in performing a personal duty of the master. The provision has established a new class of servants,—those whom the master has invested with some duties of authority and control. A comparison of the two cases of *Kenney v. Shaw*¹² and *Malcolm v. Fuller*,¹³ which presented almost the same state of facts, shows the effect of the act very clearly. A servant in general charge of a quarry directed the plaintiff to drill out a charge of powder that had failed to explode. In the

acting as superintendent with the authority or consent of such employer.” (Acts 1887, c. 270, § 1, as amended by Acts 1894, c. 499.)

Sess. Laws Colo. 1893, c. 77, § 1, cl. 1, and Mills' Ann. St. 1891-96, § 1511a, have same provision as in Massachusetts, except last clause.

Civ. Code Ala. 1896, § 1749 (2590): “When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him whilst in the exercise of such superintendence.”

¹¹ *Supra*, § 2. See dictum in *Colorado Milling & Elevator Co. v. Mitchell*, 26 Colo. 284.

¹² 133 Mass. 501.

¹³ 152 Mass. 160.

second case the master was liable; in the first not. "In that case [Kenney v. Shaw], which was before the passage of the St. of 1887, c. 270, * * * if there was any negligence it was that of the plaintiff or of the superintendent, or of both. The plaintiff assumed the risk of his own negligence, of the negligence of the superintendent, and of the explosion of gunpowder without negligence, and the injury was caused by one of those risks. * * * The object of the St. of 1887, c. 270, § 1, cl. 2, is to make the defendant liable for and to prevent the plaintiff from assuming one of those risks, and the one which the jury found caused his injury. * * * The risk that the defendant or his superintendent would negligently attempt to remove a charge of gunpowder by drilling into a hole that had been charged, before ascertaining that the charge had exploded, was not one of the risks of his employment which the plaintiff assumed."¹⁴

This clause has not changed or affected the duty which a master owes at common law to hire and retain competent servants, and the obligation remains, although the master is made liable because of the negligence of his superintendent, being a competent man, by force of the statute. "The employer is liable for an injury inflicted upon an employe by the negligence of a co-employe, when such negligence comes within the provisions of the employers' act; and that without reference to the care and diligence used by the employer in the selection of his servants or employes."¹⁵

¹⁴ *Malcolm v. Fuller*, 152 Mass. 160, 167.

¹⁵ *Culver v. Alabama M. Ry. Co.*, 108 Ala. 330, 332; *infra*, §§ 89, 117.

A plaintiff must bring his case within the terms of the act; otherwise, as the common law in this regard is not abrogated, the defense of fellow service is available to the master.¹⁶

§ 57. Superintendent a servant intrusted with duty.

A "superintendent" must be a servant, and must be intrusted by the master with duties of superintendence.

A "superintendent," under the act, is, in the first place, "any person in the service of the employer." He must be a servant. It may be that he is not hired by the person sought to be charged with his negligence, or that he does not receive his pay from him. He may be a volunteer, or be a general servant of another, lent to the defendant for the time being; but it is essential that at the time of his negligence he should come within the description of a servant,—that is, performing services for the defendant with the latter's knowledge and acquiescence, and subject to his control.¹⁷ Thus, an independent contractor, as he is not a servant, cannot be a superintendent, within the act.¹⁸

A "superintendent" is also one "who has any superintendence intrusted to him," as the clause reads in England and Alabama, or who is "intrusted with superintendence," as the phrase is in Massachusetts and Colorado.¹⁹ The master should select those servants for whose negligence he is made responsible, and the fact that a servant is treated as clothed with authority by

¹⁶ Supra, § 2.

¹⁷ Supra, § 8; City Council of Sheffield v. Harris, 101 Ala. 564.

¹⁸ Dane v. Cochrane Chemical Co., 164 Mass. 453; McGinn v. Pilling (Dec. 31, 1881) 72 Law T. 156.

¹⁹ City Council of Sheffield v. Harris, 101 Ala. 564; Drennen & Co. v. Smith, 115 Ala. 396.

other employes does not, in the absence of evidence that the master knew and acquiesced in such a state of affairs, charge the master with liability for the servant's negligent exercise of his authority.²⁰ Direct evidence that the master has constituted one his superintendent is not required, and is seldom to be obtained. It is an inference which arises from the character of the duties which the servant performs, and the acquiescence of the master in his exercise of them.

By statute in Massachusetts, the employer is liable also for the negligence, "in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer."²¹ The same rules apply to this substitute superintendent as obtain in regard to the one whose place he takes temporarily, so far as the nature of his duty at the time of his negligence is concerned. Apparently, the requirement of "the authority or consent of the employer" is satisfied by the authority or consent of a general superintendent. "There was evidence in the case that Freeman was intrusted with the duty of superintending the work of lowering the shafting by the general superintendent of the defendant company, and that the superintendent took no charge of the work and was not present. This brought Freeman within the purview of the St. of 1894, c. 499."²²

²⁰ *Boatwright v. Downing* (April 15, 1882) 72 Law T. 424. See *Hodges v. Standard Wheel Co.*, 152 Ind. 680, 689.

²¹ Acts 1887, c. 270, § 1, amended by inserting, "or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer." Acts 1894, c. 499; and this amendment is preserved in Rev. Laws Mass. c. 106, § 71. *McCabe v. Shields*, 175 Mass. 438.

²² *Knight v. Overman Wheel Co.*, 174 Mass. 455, 461.

A servant is a superintendent only as to the duties with which he is intrusted.

When a master invests a servant with duties of superintendence, he takes him out of the class of fellow servants as to those duties only, and thereby becomes liable for the negligence of the servant in performing them; but as to any other acts which the servant may do outside the scope of superintendence intrusted to him the master's liability remains as at common law. "The law recognizes that an employe may have two duties,—that he may be a superintendent for some purposes, and also an ordinary workman,—and that, if negligent in the latter capacity, the employer is not answerable."²³

Whether or not in the particular act of negligence the servant failed in a duty intrusted to him depends, in the absence of direct evidence that it was intrusted to him, upon the questions whether the employer himself had a duty to perform in regard to it which the servant ordinarily exercised and was expected to exercise, and whether the fair construction of the scope of superintendence included the performance of this duty. The superintendent, like any other agent, must act within the scope of his authority. "Doubtless, the general custody of the exploders and of all the other property there was involved in his superintendence; but is there any evidence that an inspection of them for defects in construction was a part of the duty which, as a superintendent, he was hired to perform? The admitted facts and undisputed evidence * * * make it almost certain that he was never hired to do such a duty. In

²³ *Cashman v. Chase*, 156 Mass. 342, 344; *Dantzler v. De Bardeleben C. & I. Co.*, 101 Ala. 309; *infra*, § 62.

order to hold an employer for positive acts of negligence on the part of his superintendent, if these facts relate to a matter in regard to which the employer has no duty to perform, it should be made clearly to appear that the employer has undertaken to do by his superintendent that which he was not called upon to do. An act done voluntarily by the superintendent in that field, without the direction or approval of the employer, would not be an act of superintendence."²⁴ Thus, there must be some evidence that the alleged negligent act was one which came within the scope of the duty intrusted to the servant as a superintendent.²⁵

§ 58. "Superintendence."

By superintendence is meant the direction and control of men in the manner of performing their work.

Control of machinery or appliances by the application of physical force does not come within the meaning of the word "superintendence," as used in the act. A person who, with the aid of a helper, operated an engine with his own hands, was held not to be a superintendent. "His was not the duty of giving, but of obeying, directions. He did not draw the attention of others to a thing to be done by them, but himself was required to do whatever was to be done. * * * He had none of that authority or power of control which the employer would otherwise himself have exercised, but all authority in the premises properly belonging to the

²⁴ *Shea v. Wellington*, 163 Mass. 364, 370. See, also, *Whittaker v. Bent*, 167 Mass. 588; *Whittaker v. Balmforth* (Sept. 10, 1881) 71 Law T. 327.

²⁵ *Louisville & N. R. Co. v. Bouldin*, 110 Ala. 185; *Trimble v. Whitin Machine Works*, 172 Mass. 150.

master was exercised upon him in directing his services as a manual laborer. To say that a man oversees, overlooks, directs, guides, controls, inspects, has a care of, superintends an act which he himself wholly performs, is a contortion of language not to be tolerated. These terms, indeed, are always resorted to to indicate that the thing done was not manually done by the person spoken of, but at his bidding. Each of these synonyms, and the word 'superintendence' itself, must be taken in its ordinary and usual significance here. 'Superintendence' in the statute, whatever else it may mean, has no application at all to a person whose sole duty is to be performed by personal acts of manual labor, or any direct bringing to bear of the physical energies to the end in view. It has been said, and is doubtless true in a sense, that the superintendence contemplated by the statute 'may be either over men, or machinery, plant,' etc.; but, whether over the one or the other, it must still be superintendence, power of direction, superior care and control, with authority as distinguished from direct personal manipulation; and, while there may possibly be superintendence of the operation of a machine or a number of machines by one person without intermediate human agency, such a case is most difficult of conception. We are inclined to believe that its possibility even does not exist, and to think that what is really intended by the declaration that there may be superintendence of machinery is that where one has authority to have machinery operated, to direct its operation, to overlook it, etc., and the means at hand in others to carry out his directions, he is superintendent both of the machine to be operated and of the men who are to

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manipulate it as he directs.”²⁶ “Superintendence of a thing merely, not men, is not contemplated” by this clause.²⁷

§ 59. “Any superintendence.”

In Alabama, a servant is a superintendent if he has any superintendence intrusted to him.

In the English act, although the words “who has any superintendence” are used, yet these are later defined as one “whose sole or principal duty is that of superintendence.” The reason for the insertion of the first phrase is not apparent, unless it was intended thereby to refer to the kind, as distinguished from the amount, of superintendence necessary to charge the master with liability. The division has not been retained in any of the other acts.

In the Alabama act, the phrase, “whose sole or principal duty is that of superintendence,” which is found in the statutes of England, Massachusetts, and Colorado, is omitted. “This is a pregnant omission, implying an intent on the part of the legislature to make the common master liable whenever the injury complained of by one servant is caused by any person in the service who has any superintendence intrusted to him, whether * * * or not he is ordinarily engaged in manual labor, provided only that the damnifying negligence occurs while

²⁶ *Dantzler v. De Bardeleben C. & I. Co.*, 101 Ala. 309, 316. See, also, *Cashman v. Chase*, 156 Mass. 342.

²⁷ *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 245; *Birmingham Ry. & E. Co. v. Baylor*, 101 Ala. 488; *Culver v. Alabama Midland Ry. Co.*, 108 Ala. 330; *Shaffers v. General Steam Nav. Co.*, 10 Q. B. Div. 356.

such person is in the exercise of whatever superintendence is in fact intrusted to him."²⁸

Evidence tending to show that the negligent servant is a superintendent must be offered. Calling him a "foreman," merely, is not sufficient.²⁹ When there is evidence from which his character as superintendent may be inferred, the master is responsible.³⁰

§ 60. "Sole or principal duty."

In England, Massachusetts, and Colorado a superintendent is one whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor. He is a servant with a well-defined rank and position of authority in the service.

The English act defines a superintendent as "one whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor." The acts of Massachusetts and Colorado omit the last of the sentence, and make no mention of manual labor. This omission is not material, and it is held that, if the servant is one who is ordinarily engaged in manual labor, his sole or principal duty cannot be that of superintendence, and that he does not come within the meaning of the act.

The superintendent described by these words is a person holding a well-defined rank or position in the service given by the employer duties of direction, over-

²⁸ Dantzler v. De Bardeleben C. & I. Co., 101 Ala. 309, 314.

²⁹ Louisville & N. R. Co. v. Bouldin, 110 Ala. 185; Grimsley v. Hankins, 46 Fed. 400.

³⁰ City Council of Sheffield v. Harris, 101 Ala. 564; Louisville & N. R. Co. v. Mothershed, 97 Ala. 261; Richmond & D. R. Co. v. Hammond, 93 Ala. 181.

sight, and control which he is expected to perform during all or the greater part of his time. He may also do what manual labor he pleases, or may have certain duties of manual labor which he is expected to perform, yet the chief purpose of his employment must be that of superintendence. A servant who now and then exercises authority is not within the definition. He "must be something more than a mere laborer in charge of a gang." "His principal duty, though not his sole one, perhaps, must be that of superintendence."³¹ "In a sense it is undoubtedly true that superintendence is more important than manual labor, and so, if superintendence is intrusted to a man who also works with his hands, it may be said that his principal duty is that of superintendence. But if the statute had intended that every person exercising superintendence should not be considered a fellow servant with a person injured, there would have been no need of the words 'whose sole or principal duty is that of superintendence.' These words must have a reasonable interpretation given to them."³²

There is no test which will at once determine whether the servant is a superintendent or not. It is ordinarily a question for the jury upon all facts which throw light on the nature of the duties which he is expected to perform, and the decision turns on the emphasis to be given them. Is the negligent servant a laborer in authority or a foreman who works? If the latter, he comes within the act.

³¹ *Gardner v. New England T. & T. Co.*, 170 Mass. 156, 160; *Falconer v. McCabe*, 3 F. 210 (Ct. Sess. Cas.; 5th Ser.).

³² *O'Neil v. O'Leary*, 164 Mass. 387, 390.

"Upon the facts it might be competent to find that the engineer was to some extent a superintendent. The employment and discharge of workmen, setting them at work, and showing them how to work are acts consistent with superintendency. But these acts, in connection with the evidence that his station was on the lighter, and his work there the continuous labor of running the engine in accordance with orders transmitted to him from others, show that neither his sole nor principal duty was that of superintendence."³³ Thus, a servant who works with the others, but in the absence of the general superintendent gave orders, does not come within the act, though "he exercised some acts of superintendence in the narrow field in which he was working."³⁴ Evidence that a man does the same work and receives the same pay as the other workmen,³⁵ that occasionally he gives orders,³⁶ or that he is called a "foreman,"³⁷ is not enough to make him a superintendent. Also, when most of his time is spent in manual labor, he is not a superintendent,³⁸ though a part of the work may be placed in his charge.³⁹

³³ *Cashman v. Chase*, 156 Mass. 342, 343.

³⁴ *Dowd v. Boston & A. R. Co.*, 162 Mass. 185, 186; *Kellard v. Rooke*, 19 Q. B. Div. 585, 21 Q. B. Div. 367. See *supra*, § 57, note 21.

³⁵ *Robins v. Cubitt*, 46 Law T. (N. S.) 535; *Roseback v. Aetna Mills*, 158 Mass. 379; *Adasken v. Gilbert*, 165 Mass. 443.

³⁶ *O'Brien v. Rideout*, 161 Mass. 170; *Cunningham v. Lynn & B. St. Ry. Co.*, 170 Mass. 298.

³⁷ *Moore v. Ross*, 17 Rettie, Ct. Sess. Cas. (4th Ser.) 796; *Shepard v. Boston & M. R. R.*, 158 Mass. 174; *Trimble v. Whitin Machine Works*, 172 Mass. 150; *Knight v. Overman Wheel Co.*, 174 Mass. 455, 460.

³⁸ *Hall v. Northeastern Ry. Co.*, 1 Times Law R. 359; *Kellard v. Rooke*, 19 Q. B. Div. 585, 21 Q. B. Div. 367; *O'Brien v. Rideout*, 161 (276)

“The fact that the person in charge does manual labor is not conclusive upon the question whether his principal duty is that of superintendence.”⁴⁰ A man in general charge of the work, giving orders, directing when to begin and when to stop work, supplying material, and keeping the men employed, is a superintendent, although he may do some manual labor.⁴¹ Where the evidence shows that no duty of manual labor is imposed on him, and that he does whatever work of that nature he pleases,⁴² or none at all,⁴³ he is clearly within the act.

Mass. 170; Dowd v. Boston & A. R. Co., 162 Mass. 185; Whelton v. West End St. Ry. Co., 172 Mass. 555.

³⁹ O’Neil v. O’Leary, 164 Mass. 387.

⁴⁰ Reynolds v. Barnard, 168 Mass. 226, 228 (slater); McCart v. Squire, 150 Mass. 484.

⁴¹ Malcolm v. Fuller, 152 Mass. 160 (general charge of quarry); Mahoney v. New York & N. E. R. Co., 160 Mass. 573 (freighthouse foreman); Crowley v. Cutting, 165 Mass. 436 (charge of digging trench); Brady v. Norcross, 174 Mass. 442 (foreman of carpenters); Knight v. Overman Wheel Co., 174 Mass. 455 (substitute superintendent). There was evidence from which the jury might find the person to be a superintendent in the following cases: Smith v. Lafons (July 22, 1882) 73 Law T. 220 (policeman); Coffee v. New York, N. H. & H. R. Co., 155 Mass. 21 (car inspector); Davis v. New York, N. H. & H. R. Co., 159 Mass. 532 (section foreman); Perry v. Old Colony R. Co., 164 Mass. 296 (foreman of repairs); Geloneck v. Dean Steam Pump Co., 165 Mass. 202 (yard foreman in factory); Riou v. Rockport Granite Co., 171 Mass. 162 (man in charge of blasting); Eaves v. Atlantic Novelty Mfg. Co., 176 Mass. 369 (part owner of factory).

⁴² Prendible v. Connecticut River Mfg. Co., 160 Mass. 131 (foreman piling lumber); McPhee v. Scully, 163 Mass. 216 (foreman of pile driving).

⁴³ Carroll v. Willcutt, 163 Mass. 221 (building foreman); Powers v. City of Fall River, 168 Mass. 60 (foreman digging trench); Dean v. Smith, 169 Mass. 569 (boss of blasting); Murray v. Rivers, 174 Mass. 46 (general charge of pile driving).

Evidence that the person receives the same or higher pay,⁴⁴ that he employs or discharges workmen,⁴⁵ or that he exercises control in the shop in the matter of ordering strangers out,⁴⁶ is admissible to show his position in the service.

Court or jury.

Where the evidence is conflicting, or where from the undisputed evidence men might reasonably draw different inferences, the case must be submitted to the jury under proper instructions by the court; but, if the court can say that under the definition of the word "superintendent" the evidence is insufficient to lead reasonable men to believe that the person is a superintendent, a verdict must be directed for the defendant.⁴⁷

⁴⁴ *Dowd v. Boston & A. R. Co.*, 162 Mass. 185 (carpenter); *Gardner v. New England T. & T. Co.*, 170 Mass. 156 (line foreman); *O'Brien v. Look*, 171 Mass. 36 (foreman loading ship).

⁴⁵ *Prendible v. Connecticut River Mfg. Co.*, 160 Mass. 131 (foreman piling lumber); *Sullivan v. Thorndike Co.*, 175 Mass. 41 (second hand in factory).

⁴⁶ *McCabe v. Shields*, 175 Mass. 438 (foreman in foundry).

⁴⁷ *Cashman v. Chase*, 156 Mass. 342 (engineer); *Shepard v. Boston & M. R. R.*, 158 Mass. 174 (section foreman); *Roseback v. Aetna Mills*, 158 Mass. 379 (weaver); *Burns v. Washburn*, 160 Mass. 457 (mason); *O'Brien v. Rideout*, 161 Mass. 170 (sawyer); *O'Neil v. O'Leary*, 164 Mass. 387 (powder man); *Adasken v. Gilbert*, 165 Mass. 443 (painter); *Cunningham v. Lynn & B. St. Ry. Co.*, 170 Mass. 298 (foreman of repair shop); *Trimble v. Whittin Machine Works*, 172 Mass. 150 (foreman loading machines); *Whelton v. West End St. Ry. Co.*, 172 Mass. 555 (car shifter). See, also, *Hall v. North-Eastern Ry. Co.*, 1 Times Law R. 359 (foreman of loading gang); *Claxton v. Mowlem*, 4 Times Law R. 756 (workman); *Shafers v. General Steam Nav. Co.*, 10 Q. B. Div. 356 (ganger); *Kellard v. Rooke*, 19 Q. B. Div. 585, 21 Q. B. Div. 367 (loading ship); *Robins v. Cubitt*, 46 Law T. (N. S.) 535 (workman); *Moore v. Ross*, 17 Rettie, Ct. Sess. Cas. (4th Ser.) 796 (laundry woman); *Farnham* (278)

§ 61. Need not superintend plaintiff.

The negligent superintendent need not be the superintendent of the person injured.

Where a person fulfills the definition of a superintendent under the act, the master is made responsible for his negligent exercise of the duty intrusted to him, without regard to the relationship which exists between the negligent superintendent and the person injured by his act. The act has, as it were, created a new species of servant, and as to such a one the defense of fellow service is not available to the master. Whether the servant injured be under the control or direction of the superintendent, or in an entirely different department of the work, he may recover against the master for negligence occurring in the exercise of superintendence. The creation of a new species of servant distinguishes this clause from the succeeding one, which provides a remedy for the negligence of a person to whose orders the plaintiff is bound to conform. In determining the master's liability under the latter section, the relation between the injured and the negligent servant is material. "We are unable to agree with counsel that 'the superintendence which comes within the contemplation of the statute shall be a superintendence over the person who complains of the negligence of the person intrusted with it.' The remedy for negligence of superior in the control of inferior employes, whereby injury results to the latter, is given by subsection 3. Under subsection 2 it is manifest, we think, the liability of the defendant is in no sense dependent upon the relations

v. New Bank Coal Co., 23 Rettle, Ct. Sess. Cas. (4th Ser.) 722 (hoisting cage).

existing in the service between the negligent and the injured person. If the former has superintendence intrusted to him, and is negligent in the exercise of it, to the injury of any 'servant or employe in the service or business of the master,' whatever be the relation *inter se* of the servants, the master is made liable therefor by the very terms of the statute."⁴⁸

This illustration has been put: "Suppose there was a factory, and that the person injured was one whose duty it was to go every day to the factory and put the bales of goods into carts; and suppose that the stables of the factory were totally removed from the other departments, and that the foreman of the stables negligently and improperly caused a furious horse to be put in a cart,—the words of the act would cover an injury caused by such negligence."⁴⁹

§ 62. While in exercise of superintendence.

The negligence must occur not only during the period of superintendence, but substantially in the exercise of it, in order to charge the master with liability.

Under the acts of England and Alabama, to warrant a recovery the negligence of the superintendent must occur "whilst in the exercise of superintendence." This phrase does not appear in the acts of Massachusetts or Colorado, but the court has read it into the clause, and held that, "where the negligence of a superintendent is relied on, 'the negligence complained of must occur not only during the superintendence, but substantially in

⁴⁸ *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 245; *Ray v. Wallis*, 51 J. P. 519, 3 Times Law R. 777; *infra*, § 64.

⁴⁹ *Kearney v. Nicholls* (Nov. 24, 1883) 76 Law T. 63.

the exercise of it.'"⁵⁰ In these four jurisdictions it is incumbent on the plaintiff to show—First, that the servant whose negligence is complained of comes within the definition of a “superintendent”; and, secondly, that his negligence occurred while in the exercise of superintendence. A superintendent may have two duties,—that of superintendence and that of manual labor; and when he is exercising his duty of manual labor he is not within the act, and the defense of fellow service is available to the employer. This is true whether the superintendent has certain distinct duties of manual labor to perform, or whether the labor is such that he may do it or not, as he pleases. Where the proximate cause of the injury is an act of manual labor,—such an act as a fellow workman would do,—the master is not responsible, and it is immaterial whether the act is done in the performance of certain duties of manual labor, or is done voluntarily by one whose sole or principal duty is that of superintendence. “The employer is not answerable for the negligence of a person intrusted with superintendence, who at the time, and in doing the act complained of, is not exercising superintendence, but is engaged in mere manual labor, the duty of a common workman.”⁵¹

In England and Alabama, the phrase “whilst in the exercise of superintendence” has been construed less strictly than in Massachusetts. Thus, where a person whose principal duty was that of superintendence, and

⁵⁰ *Fitzgerald v. Boston & A. R. Co.*, 156 Mass. 293; *Lynch v. Allyn*, 160 Mass. 248, 255.

⁵¹ *Cashman v. Chase*, 156 Mass. 342, 344. Handling ropes, tools or appliances, *O’Keefe v. Brownell*, 156 Mass. 133; *Riou v. Rockport*

who had no duties of manual labor, voluntarily took hold of one end of a plank and called upon a workman to aid him, but because the plank was too heavy to be handled by them it fell and injured the plaintiff, it was held that the negligence of the superintendent occurred in the exercise of superintendence, and the master was liable on the ground that the superintendent voluntarily did himself what he might have ordered another to do.⁵² Such a decision would not have been reached in Massachusetts. The difference in construction may be accounted for by the fact that the English and Alabama acts contain a clause giving remedy for an injury suffered from the negligence of a servant to whose orders the plaintiff is bound to conform, and that this provision covers many cases which might be brought under the clause in question.

When the injury is the proximate result of a negligent act of superintendence, the case comes within the words of the statute. An act of superintendence has been thus defined: "Unless the act itself is one of direction or of oversight tending to control others, and to vary their situation or action because of his direction,

Granite Co., 171 Mass. 162; *Fleming v. Elston*, 171 Mass. 187; *Flynn v. Boston Electric Light Co.*, 171 Mass. 395; *Harrington v. Westhorp* (March 11, 1882) 72 Law T. 338; *Claxton v. Mowlem*, 4 Times Law R. 756; *Shaffers v. General Steam Nav. Co.*, 10 Q. B. Div. 356; *Kellard v. Rooke*, 19 Q. B. Div. 585.

Operating power, machinery, etc., *Cashman v. Chase*, 156 Mass. 342; *Brittain v. West End St. Ry. Co.*, 168 Mass. 10; *Gilmore v. Mit-teneague Paper Co.*, 169 Mass. 471.

⁵² *Osborne v. Jackson*, 11 Q. B. Div. 619; *Louisville & N. R. Co. v. Davis*, 91 Ala. 487; *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 252. See, also, *Ray v. Wallis*, 3 Times Law R. 777; *Sweeney v. McGilvry*, 14 Rettie, Ct. Sess. Cas. (4th Ser.) 105.

it cannot fairly be said to be one in the doing of which the person intrusted with superintendence is in the exercise of superintendence."⁵³

The injury, to warrant a recovery, must be traced to a negligent act of superintendence;⁵⁴ and where it appears that there is such an act it is immaterial that the immediate cause of the injury is the intervening act of a fellow servant or of the superintendent himself. It is negligent superintendence to permit such a condition of things to exist as renders an injury possible or probable through an intervening agency. Thus, where a superintendent permitted a pile of beams to remain two or three days near an open hole in the floor, it was negligent exercise of superintendence; and the fact that the superintendent, being on crutches, and attempting to go by, pushed one with his foot, and caused it to fall and injure the plaintiff, did not relieve the master from responsibility. The immediate act causing the injury was doubtless that of a workman rather than of a superintendent, but it was one which might have been anticipated as likely to result from permitting the beams to lie so near the hole.⁵⁵

⁵³ *Cashman v. Chase*, 156 Mass. 342, 344; *Dantzler v. De Bardeleben C. & I. Co.*, 101 Ala. 309, 316.

⁵⁴ *Drennen v. Smith*, 115 Ala. 396; *McCabe v. Shields*, 175 Mass. 438.

⁵⁵ *McCauley v. Norcross*, 155 Mass. 584; *Malcolm v. Fuller*, 152 Mass. 160 (superintendent negligently directing a loaded hole to be cleared, and striking the drill himself); *Crowley v. Cutting*, 165 Mass. 436 (superintendent negligently directing lowering stone when one of the dogs, which he had put on, slipped); *O'Brien v. Look*, 171 Mass. 36 (superintendent directing the lowering of a fore and after, and unwinding rope himself). See, also, *Osborne v. Jackson*, 11 Q. B. Div. 619. Compare *Carroll v. Willcutt*, 163 Mass. 221.

The difficulty that arises in deciding whether a negligent act causing injury is an act in the capacity of workman or of superintendent is found also in directions given by one who is alleged to be a negligent superintendent. A plaintiff was injured by the dampness of molds into which iron was poured. He asked a superintendent if the molds were all right, and was answered, "Yes; go ahead, Bob." It was held, as matter of law, that this was not "the direction of a superior, but merely the assurance, in a customary colloquial form, of the fellow workman who had inspected the mold, that all was safe."⁵⁶ "The employer is not made answerable by the statute for acts of superintendence negligently performed in his service by an ordinary workman, or by one who is both workman and superintendent, in making declarations which may be interpreted either as orders of a superintendent or as assurances of a fellow workman, if in fact they are merely such assurances."⁵⁷

The rule, therefore, is that if one holding the position of superintendent is negligent in doing an act or giving an order which a fellow servant might do or give, and this is not done in his capacity of superintendent, there can be no recovery. If the act or order is strictly one of superintendence, and injury results from it, either directly or through an intervening agency, which might have been foreseen, the master is responsible.

⁵⁶ Whittaker v. Bent, 167 Mass. 588, 590.

⁵⁷ Cavagnaro v. Clark, 171 Mass. 359, 366, where a superintendent, when plaintiff was attempting to board an elevator, said, "Let her go," and the plaintiff was thereby injured. Green v. Smith, 169 Mass. 485 (superintendent directing dynamite to be placed in a rock heated by a previous blast, and aiding in the work himself); Gouin v. Wampanoag Mills, 172 Mass. 222 ("Throw down cotton"). (284)

There is another class of cases where a superintendent is exercising his duty of superintendence, and in the course of it and in pursuance of it does something which causes injury, although the object of his superintendence is not negligent, and does not in itself cause the injury. In a case recently decided⁵⁸ the plaintiff properly had his hand between the jaws of a press. A workman at an adjoining machine called upon the superintendent for instructions. The superintendent came and leaned over between the plaintiff's machine and that of the other workman, and while giving the instructions hit the shipper of the plaintiff's machine, and caused the injury. There was no liability. The court says: "The act of Meyer was too remote. *McCauley v. Norcross*, 155 Mass. 584, is the most nearly analogous case that has been called to our attention. There the plaintiff was hurt by a beam which had been left improperly near to a hole, through which it fell, and hit the plaintiff. It was held that the plaintiff was entitled to go to the jury on another ground; but it was said that 'the fact that the superintendent himself happened to be the person who pushed the beam with his foot is of no importance, because that was not an act of superintendence.' Yet it appears that, at the moment, the superintendent was walking about on crutches in the exercise of his duties. Page 585. So here. The precise place in which Meyer should be while giving his directions, the way in which he should stand or sit, and his care in managing his body in the place he se-

⁵⁸ *Joseph v. George C. Whitney Co.*, 177 Mass. 176, 178. So where a superintendent stood on the running board of car, and caused conductor to pass around him, whereby latter struck a tree near track *Hall v. Wakefield & S. St. R. Co.*, 178 Mass. 98.

lected, were too much the accident of his independent personality, and too remote from the act of giving the orders, for us to charge the defendant with the consequences of his neglect in that regard. The matter may be stated in a different form: If the motion of Meyer which caused the injury be regarded as part of an act of superintendence, the fact that he was superintending was in no way a necessary element in producing the injury. But we are of opinion that by a true construction of the statute the superintendence must contribute as such, and that where, as here, it had nothing to do with the injury *qua* superintendence, the case is not within the act."⁵⁹

⁵⁹ This ruling construes the exemption of the act to cover only negligent "superintendence," not negligent "superintendents," and is, of course, a possible, though a very narrow, construction. *Joseph v. George C. Whitney Co.*, *supra*, may perhaps be supported on the ground that the alleged negligence was an involuntary act, and partook rather of the nature of an accident than of a lack of care; but as the injury was one that could have been prevented by care, the distinction would not seem to be sound. *Hall v. Wakefield & S. St. R. Co.*, *supra*, is clearly right. The act of standing on the running board was capable of separation from the act of superintendence, and was not necessarily in pursuance of it or dictated by it. It was not a part and parcel of the act of superintendence. The opinion in this case, however, clearly intimates that the object of superintendence must be the proximate cause of the injury, and must be negligent in order to permit recovery. If the object of the superintendence is not negligent, nothing done in pursuance of it gives a right of action.

With the above case of *Joseph v. George C. Whitney Co.*, 177 Mass. 176, compare *McCoy v. Inhabitants of Westborough*, 172 Mass. 504: "There was a crack in the earth ten or twelve feet long, which extended around the place where the superintendent was standing when looking at the plaintiff and others at work in the ditch, but it did not appear that the superintendent, or any person connected with the work, saw this crack in the earth, or had their

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This is a distinct decision that under the act the plaintiff may recover only for an injury which is the result of the act of superintendence itself, and not for any act connected with the superintendence, however intimate the connection may be. The soundness of this ruling may be questioned. If it be admitted that at common law a servant is the agent of his master, but that, though a stranger might recover for his negligence, a fellow servant cannot, because that negligence is a risk assumed, then, since the act takes away this defense of assumed risk, and places the plaintiff in the position of a stranger, he should be permitted to recover for such negligent acts as would give a stranger a cause of action. A stranger may recover where the agent commits a negligent act in the course of his duty and within the scope of his authority. A superintendent under the act, engaged at the moment in superintendence, is acting within the scope of his authority. Although the end and object of his superintendence and of his master's business is not negligent, and does not cause injury, yet any subsidiary act done in pursuance of that business which does cause injury would render the master responsible to a stranger, and should also render him responsible to a servant. A contrary ruling in effect denies the application of the ordinary principles of agency in actions between a servant and his

attention in any way called to it." The court held "It was competent for the jury to find that, in walking along the bank, and in stopping to look down at the workmen, the superintendent was exercising an oversight of the work, and therefore was engaged in an act of superintendence. * * * It was for the jury to say whether, in view of the crack in the earth, it was negligent for the superintendent to stand where he did without giving any warning." See *infra*, § 67.

master. The act should be construed with reference to the common-law principles, unless it clearly appears that they are changed by it, and it is believed that the act does not require so narrow a construction as has been given to it in this case.

A distinction may reasonably be taken between acts which are part and parcel of the superintendence, and acts which, though done during the period of superintendence, are not intimately connected with it. In the case under discussion the superintendent leaned between the machines in order better to superintend. The "leaning" was not itself an act of superintendence, but could not be disassociated from the superintendence, and was dictated by a mind fixed on the object of superintendence. But where a foreman in a mine engaged in overseeing the men lights his pipe and causes an explosion, it is perfectly possible to separate the two, and to say that lighting the pipe was not dictated by a mind intent upon the object of superintendence, but was a separate act and a distinct exercise of the will. The mind, as well as the act, was that of a workman, and not of a superintendent. The *dictum* in *McCauley v. Norcross*, above quoted, supports this view rather than the decision rendered upon it.

This clause of the act should give a remedy to a servant injured through negligence, when the negligent person is a "superintendent," acting at the time in his capacity of superintendent, and not of workman, and when the negligent act, if not itself one of superintendence, is in furtherance of the immediate object of superintendence, and cannot reasonably be separated from it.

§ 63. Negligence of superintendent.

The master is responsible for the negligence of his superintendent committed in the course of his duties.

The act causing injury, and for which the master is sought to be charged, must be negligent. A superintendent is a servant invested with some share of his master's authority over the department of the service intrusted to him, and his negligence within the scope of his authority is the negligence of the master, and depends upon the same principles.

The negligence must be proved. The mere fact that the superintendent directed the plaintiff to work in a place where he was injured several days later by a bale of hay falling upon him is not enough, in the absence of evidence that the superintendent piled the hay, or knew it was liable to fall, or directed the servant to work in the particular spot where he was injured, to charge the master.⁶⁰ There is no negligence on the part of a superintendent in failing to discover, warn, or provide against dangers the existence of which he is not bound, in the course of his duty, to know,⁶¹ or against dangers which depend upon facts and circumstances which he does not know,⁶² or would not discover by the exercise of reasonable care.⁶³

⁶⁰ *Fitzgerald v. Boston & A. R. Co.*, 156 Mass. 293; *Fleming v. Elston*, 171 Mass. 187.

⁶¹ *Bowers v. Connecticut River R. Co.*, 162 Mass. 312 (defective drawbars); *Shea v. Wellington*, 163 Mass. 364 (dynamite exploders).

⁶² *Carroll v. Willcutt*, 163 Mass. 221 (ignorance of the presence of a stone on staging which fell); *O'Reilly v. Bowker Fertilizer Co.*, 174 Mass. 202 (ignorance that a substance was inflammable, or that there was a lantern near); *Moore v. Gimson*, 5 Times Law R. 177 (where superintendent had taken expert advice).

⁶³ *Chisholm v. New England T. & T. Co.*, 176 Mass. 125 (imper-
(289)

Since a superintendent's duty is that of oversight and control of the portion of the work allotted to him, he is bound to use care in the details of the work. When he directs what work is to be done, he must see to it that a proper method of work is chosen.⁶⁴ He must not begin work without proper materials and appliances;⁶⁵ and during its progress he must take proper precautions to guard against accidents.⁶⁶ He should not create or allow such a condition of things to exist as renders an accident probable through the means of an in-

fectly insulated wire). See, also, *Brady v. Norcross*, 174 Mass. 442 (staging).

⁶⁴ *Crowley v. Cutting*, 165 Mass. 436 (wrong method of lowering stone into trench); *Reynolds v. Barnard*, 168 Mass. 226 (overloaded staging); *O'Brien v. Look*, 171 Mass. 36 (improper method of lowering fore and after); *Leslie v. Granite R. Co.*, 172 Mass. 468 (improper method of lifting stone by derrick); *McMahon v. McHale*, 174 Mass. 320 (rigging derrick); *Knight v. Overman Wheel Co.*, 174 Mass. 455 (lowering shafting); *Thomas v. Great Western Colliery Co.*, 10 Times Law R. 244; *City Council of Sheffield v. Harris*, 101 Ala. 564 (blasting); *Green v. Smith*, 169 Mass. 485 (blasting); *Dean v. Smith*, 169 Mass. 509 (blasting).

⁶⁵ *Connolly v. City of Waltham*, 156 Mass. 368 (bracing trench); *Louisville & N. R. Co. v. Jones*, 30 So. 586.

⁶⁶ *Hennessy v. City of Boston*, 161 Mass. 502 (failure to shore trench); *Powers v. City of Fall River*, 168 Mass. 60 (failure to shore trench); *Coffee v. New York, N. H. & H. R. Co.*, 155 Mass. 21 (failure to have trains inspected); *Lynch v. Allyn*, 160 Mass. 248 (working under overhanging bank of earth); *Prendible v. Connecticut River Mfg. Co.*, 160 Mass. 131 (overloading staging); *Mathoney v. New York, N. E. & H. R. Co.*, 160 Mass. 573 (failure to use gangplank in unloading bale); *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202 (moving heavy machine on unsafe truck); *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71 (fall of rock in mine); *Tremblay v. Mapes-Reeve Construction Co.*, 169 Mass. 284 (removing props from arch); *Grimaldi v. Lane*, 177 Mass. 565 (permitting use of iron scraper to withdraw dynamite from hole); *Bartholomeo v. McKnight (Mass.)* 59 N. E. 804 (failing to shore trench); *Louisville & (290)*

tervening agency which due care might have foreseen.⁶⁷ He must care for the safety of his men by seeing that drunken or incompetent servants are not allowed to work,⁶⁸ and that each does the duty required of him.⁶⁹ He may, however, trust that they will take reasonable care to protect themselves, and need not anticipate that the rules laid down for their protection will be violated.⁷⁰ He should instruct the workmen,⁷¹ and warn them against dangers which are not obvious to them,⁷² and

N. R. Co. v. Bouldin, 110 Ala. 185, 121 Ala. 197 (leaving oil box on track); Drennen v. Smith, 115 Ala. 396 (failure to extinguish fire in mine); Decatur Car Wheel & Mfg. Co. v. Mehaffey (Ala.) 29 South. 646 (raising iron bar); Bowie v. Rankin, 13 Rettle, Ct. Sess. Cas. (4th Ser.) 981 (placing workman in dangerous place when machine was being moved).

⁶⁷ Malcolm v. Fuller, 152 Mass. 160 (drilling out loaded hole); McCauley v. Norcross, 155 Mass. 584 (leaving beams piled near open hole); Seaboard Mfg. Co. v. Woodson, 94 Ala. 143 (permitting engine to be defective).

⁶⁸ McPhee v. Scully, 163 Mass. 216.

⁶⁹ Coffee v. New York, N. H. & H. R. Co., 155 Mass. 21 (inspection of cars); Louisville & N. R. Co. v. Davis, 91 Ala. 487 (incompetent brakeman).

⁷⁰ Burns v. Washburn, 160 Mass. 457 (building temporary staging); Perry v. Old Colony R. Co., 164 Mass. 296 (sending plaintiff to make repairs under engine without telling engineer); Fairman v. Boston & A. R. Co., 169 Mass. 170 (collision of trains); Thompson v. Norman Paper Co., 169 Mass. 416 (may assume that plaintiff will notice slipperiness of beam); American Carbon Co. v. Jackson, 24 Ind. App. 390 (may assume plaintiff will put ladder in safe place). But not when it is the custom to violate the rules. Baddeley v. Granville, 19 Q. B. Div. 423.

⁷¹ Henry v. King Philip Mills, 155 Mass. 361 (how to clean engine); Burns v. Washburn, 160 Mass. 457 (building staging).

⁷² Davis v. New York, N. H. & H. R. Co., 159 Mass. 532 (warning of approaching train), see Sullivan v. Fitchburg R. Co., 161 Mass. 125; Lynch v. Allyn, 160 Mass. 248 (danger of bank falling); Conners v. Morton, 160 Mass. 333 (open elevator well); Kanz v. Page,

when an emergency arises he is bound to do all that a person with his authority could be reasonably expected to do.⁷³

It is not negligence for a superintendent to be absent, since he cannot be expected personally to watch every detail of the work.⁷⁴ A superintendent renders his master liable for negligent orders given by him,⁷⁵

168 Mass. 217 (room in which there has been an explosion); *Hughes v. Malden Gas Light Co.*, 168 Mass. 395 (caving of trench); *De Lisle v. Ward*, 168 Mass. 579 (ordering log hoisted before plaintiff got clear); *Scullane v. Kellogg*, 169 Mass. 544 (sending plaintiff under elevator); *McCoy v. Inhabitants of Westboro*, 172 Mass. 504 (failing to warn of crack in bank of trench); *Gorman v. Woodbury*, 173 Mass. 180 (breaking off frozen bank of earth); *Cote v. Lawrence Mfg. Co. (Mass.)* 59 N. E. 656 (failing to warn of burning planks being thrown); *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181 (failure to place danger flags when track being repaired); *Postal Tel. Cable Co. v. Hulsey*, 115 Ala. 193 (failure to warn when tree being chopped would fall); *Aitken v. Newport Slipway Dry Dock*, 3 Times Law R. 527 (failing to warn that machinery was disconnected).

⁷³ *Bessemer Land & Improvement Co. v. Campbell*, 121 Ala. 50 (extinguishing fire in mine).

⁷⁴ *Fitzgerald v. Boston & A. R. Co.*, 156 Mass. 293; *Burns v. Washburn*, 160 Mass. 457; *Robins v. Cubitt*, 46 Law T. (N. S.) 535.

⁷⁵ *McPhee v. Scully*, 163 Mass. 216 (ordering hammer hoisted when fall was foul); *Gagnon v. Seaconnet Mills*, 165 Mass. 221 (directing plaintiff to sit on timber hauled over rough road); *Gardner v. New England T. & T. Co.*, 170 Mass. 156 (raising telegraph pole); *O'Brien v. West End St. R. Co.*, 173 Mass. 105 (ordering motorman into dangerous position); *Murray v. Rivers*, 174 Mass. 46 (prematurely ordering hammer to fall); *Brady v. Norcross*, 174 Mass. 442 (sending plaintiff on staging); *McCabe v. Shields*, 175 Mass. 438 (directing use of dangerous implement); *O'Brien v. Nute-Hallett Co.*, 177 Mass. 422 (sending plaintiff into bin); *Eaves v. Atlantic Novelty Mfg. Co.*, 176 Mass. 369 (directing plaintiff to start defective machine); *Jones v. Alabama Mineral R. Co.*, 107 Ala. 400; *Alabama Mineral R. Co. v. Jones*, 121 Ala. 113 (ordering car to go at too great speed); *Southern Ry. Co. v. Shields*, 121 Ala. 460 (order to stop moving car in dangerous way); *Smith* (292)

but it must appear that the order is given in his capacity of superintendent, and cannot be interpreted as the assurance of the workman.⁷⁶ He need not give unnecessary directions,⁷⁷ nor is it negligent to direct the performance of dangerous work where the nature of the work is obvious.⁷⁸ It may be negligent in a superintendent to repudiate a suggestion made to him.⁷⁹

If a superintendent voluntarily does what he might have ordered a servant to do, he is, in Alabama and England, held to charge his employer with his negligence.⁸⁰

Evidence.

The employer's liability for the negligent acts of his superintendent cannot "be measured by the latter's poise of temperament, nor that the character of a given act of the superintendent in respect of negligence can be made to depend upon his excitability, or the reverse.

* * * The law cannot take any account of those personal idiosyncracies of a superintendent, which tend to perturb him on occasion beyond ordinary men."⁸¹

v. Lafons (July 22, 1882) 73 Law T. 220 (order given by policeman to driver of cart).

⁷⁶ Whittaker v. Bent, 167 Mass. 588 (filling iron molds); Cavagnaro v. Clark, 171 Mass. 359 (starting elevator); Gouin v. Wampanoag Mills, 172 Mass. 222 (throwing down cotton).

⁷⁷ La Belle v. Inhabitants of Montague, 174 Mass. 453.

⁷⁸ Booker v. Higgs, 3 Times Law R. 618.

⁷⁹ Allard v. Hildreth, 173 Mass. 26.

⁸⁰ Carter v. Clarke, 78 Law T. R. (N. S.) 76 (taking lantern into hold of ship); Osborne v. Jackson, 11 Q. B. Div. 619 (handling timber); Louisville & N. R. Co. v. Davis, 91 Ala. 487 (acting as brakeman); Kansas City, M. & B. R. Co. v. Burton, 97 Ala. 240 (placing car near track).

⁸¹ Bessemer Land & Improvement Co. v. Campbell, 121 Ala. 50, 60. See, also, Joseph v. George C. Whitney Co., 177 Mass. 176.

Evidence in regard to the care a superintendent usually takes in regard to his work is inadmissible.⁸²

Evidence of conversations of other servants with the superintendent is admissible to show that he had knowledge of the dangerous character of the place or the service, and therefore ought to have warned the plaintiff.⁸³

⁸² *Gunn v. New York, N. H. & H. R. Co.*, 171 Mass. 417.

⁸³ *City of Ft. Wayne v. Christie*, 156 Ind. 172, 59 N. E. 385; *Bartholomeo v. McKnight* (Mass.) 59 N. E. 804.

CHAPTER VI.

CONFORMITY TO ORDERS; RULES.

- § 64. Effect of Clause on Conformity to Orders.
- 65. Plaintiff Must be Bound to Conform.
- 66. Order or Direction.
- 67. Injury Must Result from Having Conformed.
- 68. Negligence.
- 69. Effect of Clause on Rules.
- 70. Act or Omission.
- 71. Obedience.
- 72. Rules, By-Laws, and Particular Instructions.

§ 64. Effect of clause on conformity to orders.

The clause of the act permitting recovery for the negligence of a person to whose orders the workman was bound to conform removes the defense of fellow service in cases where it appears that there were special duties of control given to one servant over another.

Like the preceding clauses of the act, the one in question extends the liability of the master for the negligence of his servant in a case which falls within its terms. The defense of fellow service is taken away, and the risk of the negligence of such a servant as is described in the section is not assumed.¹ The clause is enacted in substantially the same words in the statutes of England, Alabama, and Indiana,² but has not been

¹ Supra, §§ 2, 55, 56.

² 43 & 44 Vict. c. 42, § 1, subsec. 3: "By reason of the negligence of any person in the service of the employer, to whose orders or

adopted in Massachusetts or Colorado. Under it a servant may recover for the negligence of a person to whose orders or directions he was at the time of the injury bound to conform, and did conform, where the injury resulted from having so conformed.

This clause was not intended to provide a cause of action in a case which is properly embraced in the preceding section relating to the negligence of a superintendent. They are independent one of the other, and each has a different field of operation.³ Nor does this clause provide a cause of action in a case which comes within the provision in regard to defects in the ways, works, or machinery.⁴ As the legislature in the "defect" clause gave a remedy for the negligence of a workman who was charged with the care of the ways, works, and machinery, so here it has given a remedy for the negligence of a workman charged with the control of

directions the workman, at the time of the injury, was bound to conform, and did conform, where such injury resulted from his having so conformed."

Civ. Code Ala. 1896, § 1749 (2590), cl. 3: "When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employe, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed."

Burns' Rev. St. Ind. 1901, § 7083 (Acts Ind. 1893, c. 130, § 1, cl. 2): "Where such injury resulted from the negligence of any person in the service of such corporation to whose order or direction the injured employe, at the time of the injury, was bound to conform, and did conform."

³ *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 245; *Bridges v. Tennessee C., I. & R. Co.*, 109 Ala. 287, 292; *Indianapolis Gas Co. v. Shumack*, 23 Ind. App. 87.

⁴ *Bridges v. Tennessee C., I. & R. Co.*, 109 Ala. 287.

certain other servants. It "distinguishes employes of a superior rank,—employes clothed with responsibility and authority of the employer."⁵

There is a broad distinction between a "superintendent" and a "person to whose orders a servant is bound to conform." The former has a well-defined rank or position in the service, and is a new species of servant created by the statute. His chief duty is that of superintendence, as distinguished from manual labor. The latter may be an ordinary workman. He holds no definite position in the service, and the inquiry into the general character of his duties is immaterial. It follows that, if a superintendent is negligent, the master is liable without regard to the question whether the injured person was under the immediate supervision of the superintendent or in an entirely different department of work; but, where the negligence is that of a person to whose orders the plaintiff was at the time bound to conform, the words of the statute require an investigation into the personal relations of the injured and the negligent servant, and, unless it appears that the plaintiff was bound to conform to orders given him by the negligent servant, there can be no recovery. "The legislature only intended to fix the master with liability for the negligence of two classes of persons, viz., one a person who has what may be termed superintendence, and another a person to whose orders the workman is bound to conform;"⁶ and it may be said that one is intrusted with "general," and the other with

⁵ Louisville, N. A. & C. Ry. Co. v. Wagner, 153 Ind. 420, 425; Howard v. Bennett, 58 Law J. Q. B. 129, 60 Law T. (N. S.) 152.

⁶ Kellard v. Rooke, 19 Q. B. Div. 585, 587.

“limited,” superintendence. “I see in the terms of the enactment no foundation for any distinction of classes upon this subject. The question is not whether the person who gave the orders or directions occupied a high or a humble position in the works. It is simply whether, whatever was his position, he was one to whose orders or directions at the time of the accident the workman injured was bound to conform. If he was, the words of the statute are satisfied, and a limitation of their operation, for the purpose of restricting the benefit the statute was intended to confer, would be not an interpretation of the words of the clause, but a capricious interference with its application.”⁷

“The statute places the case upon a principle different from that in support of the co-servants rule and the assumption of risk. The test here is threefold: (1) Was the offending servant clothed by the employer with authority to give orders to the injured servant that the latter was bound to obey? (2) Did the injury result to the latter from the negligence of the former while conforming to an order of the former that the injured servant was at the time bound to obey? (3) Was the injured party at the time of injury in the exercise of due care and diligence? If these three things concur, plaintiff exhibits a good cause of action.”⁸

§ 65. Plaintiff must be bound to conform.

The plaintiff must have been at the time bound to conform to the orders of the negligent servant.

⁷ *Dolan v. Anderson*, 12 Rettle, Ct. Sess. Cas. (4th Ser.) 804.

⁸ *Louisville, N. A. & C. Ry. Co. v. Wagner*, 153 Ind. 420, 423; *Whitcomb v. Standard Oil Co.*, 153 Ind. 513; *Mobile & O. R. Co. v.* (298)

Person must have authority to give the order.

The plaintiff must first establish that at the time of the negligent order or direction he was bound to conform to it; and this presupposes that the person giving the order had the right to give it,—that he was intrusted by the master with that duty. “The statute in question certainly intends that where the injury results from the negligence of a person in the service of a corporation, that such person must be one who is by it at least expressly or impliedly authorized to give the order or direction, and thereby require the employe to obey. If he is not, then in a legal sense the employe is not bound to conform to his order.” Thus, “the mere fact that S., his foreman, may have temporarily left him in charge of the work in the saw room did not invest him with the powers of such foreman, nor put him in a position at the time to be the representative of appellee, so as to require his associates engaged with him in the same labor to conform to his orders.”⁹

Evidence that the negligent servant was called a “foreman” is not enough to show that he had authority to give orders to the negligent servant and to require obedience;¹⁰ but, in the absence of direct evidence as to his authority, a finding that he was a person to whose orders the plaintiff must conform will be supported on evidence that he was the only person on the premises

George, 94 Ala. 199, 219; Wild v. Waygood [1892] L. R. 1 Q. B. Div. 783, 793.

⁹ Hodges v. Standard Wheel Co., 152 Ind. 680, 689. See Murphey v. Smith, 19 C. B. (N. S.) 361; Garland v. City of Toronto [1896] 23 Ont. App. 238.

¹⁰ Kellard v. Rooke, 19 Q. B. Div. 585.

to give orders,¹¹ or that, being the head of a squad, he gave orders which were obeyed, and his exercise of authority was never challenged till after the accident.¹² "The words in the subsection are more applicable to a man in a superior position, and do not apply to fellow workmen who are not in the least in a position of superiority to each other, or amenable even to the suggestions of one another." Thus, where the negligent and the injured servants worked together on a calico-printing machine, and after the injured servant had put in the calico, and before he was clear, the negligent one started the machine without warning, it was held that the latter was not within the act.¹³ It must appear that the relative positions of the parties are such "that one owed obedience to the other, and that the order was such as could not have been declined without contumacy."¹⁴

The order must be such as requires obedience.

The injured servant is bound to obey only such orders as are within the scope of the authority expressly or impliedly given to the negligent employe. He may be bound to obey certain orders, and not others. Thus, if the person cannot direct the place where or the time when the plaintiff shall work, the latter is not bound to follow such directions, and, if he does to his injury, he cannot recover.¹⁵

¹¹ Wild v. Waygood [1892] 1 Q. B. 783.

¹² Dolan v. Anderson, 12 Rettie, Ct. Sess. Cas. (4th Ser.) 804.

¹³ Howard v. Bennett, 58 Law J. Q. B. 129, 60 Law T. (N. S.) 152.

¹⁴ McManus v. Hay, 19 Scot. Law R. 345, 9 Rettie, Ct. Sess. Cas. (4th Ser.) 425. See, also, Mobile & O. R. Co. v. George, 94 Ala. 199; Postal Telegraph Cable Co. v. Hulsey, 115 Ala. 193; Hooper v. Holme, 12 Times Law R. 537.

When the order given is one forbidden by the rules, and the injured servant knows that it is forbidden, he may properly refuse to obey, and, if he is injured through obedience, he cannot hold the master responsible. Thus, where boys under fifteen were by a rule of the business forbidden to drive vans, but the foreman directed the plaintiff, who was under age and knew of the rule, to drive a van, and offered him more pay, it was held that the plaintiff could not recover for an injury happening in obedience to the order.¹⁵

The plaintiff is probably bound to obey any order given him by a person in authority over him, if the order is one which reasonably comes within the scope of that authority, without regard to the question whether or not the person has express authority to give it. But if the plaintiff knows that the order is without the scope of the authority, or is in any manner forbidden, he takes the risk of obeying it, and cannot recover if an injury results.

§ 66. Order or direction.

The order or direction must be such as requires obedience. It need not be in express terms, but may be implied from the circumstances.

A mere suggestion or warning is not an order or

¹⁵ *Snowdon v. Baynes*, 24 Q. B. Div. 568, 25 Q. B. Div. 193; *Brown v. Butterly Coal Co.*, 2 Times Law R. 159.

¹⁶ *Bunker v. Midland Ry. Co.*, 47 Law T. (N. S.) 476, 31 Wkly. Rep. 231; *Hooper v. Holme*, 12 Times Law R. 537 (general instructions to post lookouts; plaintiff not obliged to work without them). See *Marley v. Osborn*, 10 Times Law R. 388 (where the rule was commonly violated); *Sweeney v. McGilvray*, 24 Scot. Law R. 91

direction within the meaning of the act,¹⁷ unless it takes such form as requires obedience to it.¹⁸

An order may be given by word of mouth, by sign, or in any way by which it may be communicated.¹⁹ An order or direction may be implied from circumstances. It is not necessary to give an order to a man to do that which is in the ordinary course of his duty to do every day in the week. Thus, where it was the plaintiff's duty to assist a carman in unloading frames, and, the frames being tied together, the carman untied his end, and the plaintiff, without direction and of his own motion, did the same at his end, and the carman, seeing him, did not object, but drew away one of the frames, thereby causing the injury, it was held that this section applied, and the plaintiff could recover.²⁰ A special order to do the particular act need not be given if it can be said that a direction to do the act was reasonably to be implied from the general order given. Thus, an order to uncouple cars implies a direction to go between them;²¹ and where work has been done by men inside a furnace, an order to raise the furnace implies a direction to the men to come out;²² an order to go

(men ordered to come before seven o'clock and move cars which it was not defendant's business to do, but which was in furtherance of business. Plaintiff, obeying, could recover).

¹⁷ Howard v. Bennett, 58 Law J. Q. B. 129, 60 Law T. (N. S.) 152.

¹⁸ Birmingham F. & Mfg. Co. v. Gross, 97 Ala. 220. In performing the ordinary duties of his position, one is not acting under special orders or directions, and so not within the act. Grand Rapids & I. Ry. Co. v. Pettit (Ind.) 60 N. E. 1000.

¹⁹ Dolan v. Anderson, 12 Rettie, Ct. Sess. Cas. (4th Ser.) 804.

²⁰ Millward v. Midland Ry. Co., 14 Q. B. Div. 68.

²¹ Mobile & O. R. Co. v. George, 94 Ala. 199.

²² Dolan v. Anderson, 12 Rettie, Ct. Sess. Cas. (4th Ser.) 804.

to a certain place may imply a direction to remove a machine which obstructs the passage.²³

Unless the order implies the contrary, it must be assumed that compliance with it was intended to be in a manner safe to the plaintiff.²⁴ Thus, in a case where the plaintiff's intestate was injured by failure to station lookouts to give warning of the approach of trains, it appeared that the foreman was mixing cement near a sleeper, and directed the plaintiff's intestate also to mix cement; but there was no evidence that the foreman ordered him to do the work in a dangerous place, and no recovery was allowed.²⁵ Regarding this case, it was said in a later decision: "There was no order at all given to the deceased man to go into the dangerous place where he was killed, and so he might have chosen a safe place for mixing the cement. It was sought in that case to show an implied order from the fact that the foreman * * * was mixing cement in a dangerous place, but that inference was rejected."²⁶

§ 67. Injury must result from having conformed.

The plaintiff must conform to the order, and the injury must have resulted from his having so conformed.

In addition to evidence that an order or direction was given by a person to whose orders the plaintiff was

²³ *Hatfield v. Enthoven* (Dec. 31, 1881) 72 *Law T.* 157.

²⁴ *Davis v. Western Ry.*, 107 *Ala.* 626.

²⁵ *Hooper v. Holme*, 12 *Times Law R.* 537, 13 *Times Law R.* 6.

²⁶ *Reynolds v. Holloway*, 14 *Times Law R.* 551 (where plaintiff was ordered to pull down a house, and, on taking out a partition, the roof fell. He came within the act). See, also, *Medway v. Greenwich Inlaid Linoleum Co.*, 14 *Times Law R.* 291 (setting plaintiff at work on dangerous machine without instruction as to the method of operating it).

bound to conform, it must appear that the plaintiff "did conform," and that "the injury resulted from his having so conformed." The Indiana act omits this latter clause.

It has been said in Alabama and Indiana that the order must be the proximate cause of the injury,²⁷ although in a late case in the latter state it was held that the plaintiff might recover where it appeared that he was at work in a trench by order of a foreman, repairing a leak in a gas pipe, and by a negligent use of a lighted lantern the foreman caused an explosion.²⁸

The construction of the clause, "where such injury resulted from having so conformed," has not been passed upon in Alabama, but has been the subject of several English decisions. It is not necessary that the injury should be caused by or be the proximate result of the order or direction, under the construction placed upon the phrase in England; but includes "such direct or indirect results as are closely connected with the order that has been given."²⁹ Under this construction, and by the terms of the Indiana statute, the *causa causans* of the injury need not be a negligent order, but recovery may be had if, while conforming to an order proper in itself, the plaintiff is injured by the negligence of the person who gave it, provided that the injury would not

²⁷ *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181; *Dantzler v. De Bardeleben C. & I. Co.*, 101 Ala. 309; *Alabama Midland Ry. Co. v. McDonald*, 112 Ala. 216; *Hodges v. Standard Wheel Co.*, 152 Ind. 680; *Louisville, N. A. & C. Ry. Co. v. Wagner*, 153 Ind. 420.

²⁸ *Indianapolis Gas Co. v. Shumack*, 23 Ind. App. 87.

²⁹ *Wild v. Waygood* [1892] 1 Q. B. 783, 795. The dictum in *Howard v. Bennett*, 58 Law J. Q. B. 129, 60 Law T. (N. S.) 152, to the contrary, is disapproved in the above case. See note 31.

have occurred but for his conformity to the order. The negligence must be that of a person to whom the plaintiff at the time is bound to conform, and occurring during the period in which the person may still be said to be filling that description, and not acting merely as a fellow laborer.

Thus, in a case where the plaintiff received directions from a carpenter as to what work he should do, and was bound to follow such orders, but was not obliged to conform to directions as to the place where or the time when he should work, and while he was, of his own accord, working after hours, he was injured by the negligence of the carpenter, it was said as a *dictum* that he could not recover. "We think it right, however, to point out that * * * there is one obvious difference * * * between a case in which the circumstances of danger are brought about by the performance on the part of the person injured of acts, the direct result of obedience to an order then and there given, and which then expose him to immediate risk if the person giving the order be careless, and a case in which obedience to the order is accompanied by no circumstance of present risk from the negligence of the person giving the order, and in which, if the mere fact that obedience to the order involves the presence of the workman in a spot where he is afterwards endangered by acts of the person giving the order is sufficient to give a right of action, the liability may flow from an order given a week or a month before the accident happened. In such a case it is obvious that such an order might amount to very little more than the mere selection of a particular workman to be employed upon a particular

job, and it is difficult to suppose that such a case could be within the act.”³⁰ The court of appeals, in a later case, passed upon the point raised by this *dictum*. Duplea, a workman to whose orders the plaintiff was bound to conform, directed him to put a plank across an elevator well and stand upon it. The plaintiff conformed to the order, and, while standing on the plank, Duplea started the elevator and injured him. The court held that the injury resulted from having conformed to the order, and that the plaintiff could recover. The phrase would bear these possible constructions: “That it only means an injury from conforming to a negligent order, the negligence being in the order itself; that it means anything that may occur while conforming to an order; and that it means only such direct or indirect results as are closely connected with the order that has been given;” and the court considered the last to be the true construction. Lord Herschell said: “It is quite clear the injury did result from the plaintiff having conformed to an order when he was told to go to a place which was, and must have been known to be, a dangerous place, if the person who told him to go there was guilty of negligence. That person having been guilty of negligence created the danger and caused the injury, it seems to me the case is within the very terms of the act. * * * It is not limited to an injury arising from an order, which order is negligent in itself. * * * It would be limiting it far beyond what the words either

³⁰ Snowden v. Baynes, 24 Q. B. Div. 568. The case was decided on the point that the carpenter had no authority to give the order to which the plaintiff was conforming, and the court of appeals (25 Q. B. Div. 193) affirmed the decision, but did not notice the *dictum* quoted.

require or will admit of." Lindley, L. J., said: "The whole, I think, comes to this: that the injury must be the result of negligence of the person giving those orders and of the plaintiff conforming to those orders. It will not do to prove one of these things only. The injury must be the result of the two, and, if the two are so connected together as to cause the injury, then it appears to me that the case comes within this section." Kay, L. J., said: "It means only such direct or indirect results as are closely connected with the order that has been given."³¹

This is a more liberal construction than that placed upon the clause of the superintendence section, "whilst in the exercise of superintendence," and it is more indefinite and difficult of application. These words refer to the cause of the injury; that it must be caused by a superintendent at the time acting as a superintendent. The phrase, "where such injury resulted from having

³¹ Wild v. Waygood [1892] L. R. 1 Q. B. 783. In Wright v. Wallis, 3 Times Law R. 779, the plaintiff, engaged in unloading a ship, was directed by the person to whose orders he was bound to conform to work, and the person some time later threw a bundle upon him. It was said: "An argument had been addressed to the court that, if you ordered a man to stand in a certain place, and then threw something at him and injured him, the injury was not caused by his conforming to the order, but solely by the subsequent act. If these refinements were to be introduced into real life, real life could not go on as it did. The order to stand there, and the throwing down of the iron, were all part of the same occurrence." Compare with this, Kellard v. Rooke, 21 Q. B. Div. 367, where a man stationed to give warning when goods were raised or lowered called "Stand from under," and immediately dropped a bale of goods, which injured the plaintiff. The plaintiff could not recover, and the cases were distinguished on the ground that, in the latter, there was no order to which the plaintiff conformed at the time of injury. See, also, *McManus v. Hay*, 9 Rettie, Ct. Sess. Cas. (4th Ser.) 425.

so conformed," refers rather to the result than to the cause, and to the condition of affairs created by the "person" rather than to any description of him. Thus, the word "resulted" may imply a condition of affairs attending the negligence rather than the proximate result of the negligence.

§ 68. Negligence.

To give a cause of action there must be negligence on the part of the person to whom the plaintiff is bound to conform.

In the preceding section it has been noted that the negligence must be that of a person to whose orders the plaintiff is bound to conform, but that, in England, the negligence is not limited to a careless order or direction, but that recovery may be had where the plaintiff conforms to an order proper in itself, but is injured through the subsequent negligence of the person who gave it, providing it can be said that this negligence is a part of the whole transaction, and is done while the person is still filling the description, and is not a separate and distinct act done in his capacity of fellow workman.³²

Negligence is the foundation of the action.³³ The person who gives the order must himself have knowledge of the facts;³⁴ and if he does not know or suspect danger, and is not charged with such knowledge, he cannot be said to be negligent in giving what is, so far as he knows, a proper order.³⁵

³² Supra, § 67, and cases cited.

³³ *Mary Lee C. & Ry. Co. v. Chambliss*, 97 Ala. 171 (plaintiff must show the order itself was negligent).

³⁴ *Birmingham F. & Mfg. Co. v. Gross*, 97 Ala. 220; *Dantzler v. De Bardeleben C. & I. Co.*, 101 Ala. 309.

³⁵ *Kettlewell v. Paterson*, 24 Scot. Law R. 95; *Grand Rapids & I.*

"The order must be such as implies requirement of obedience at once, or under conditions existing or in contemplation of the person giving the order when it is given, for it is necessarily by the conditions existing or in contemplation at the time the order is given that the question of negligence *vel non* in giving it is to be determined."³⁶ If the plaintiff is in a dangerous place, it is negligence to give an order, obedience to which injures him;³⁷ and it is negligence to give a direction which exposes a servant to extraordinary risks, such as sending a boy to alter moving machinery.³⁸

A special order or direction to do an act which causes an injury fixes the master with responsibility, and it is immaterial how the order is given or communicated to the plaintiff.³⁹ The master is also liable where the order, though general in form, implies that a particular act which causes the injury must be done. Such an implication amounts to a specific direction to do the act, and may thus be negligent.⁴⁰ Such an implication must, however, be clear from the terms of the order, since it will not be assumed that the person giving it

Ry. Co. v. Pettit (Ind.) 60 N. E. 1000 (conductor forwarding a premature signal while plaintiff is coupling cars is not negligent).

³⁶ Birmingham F. & Mfg. Co. v. Gross, 97 Ala. 220, 226.

³⁷ Louisville, N. A. & C. Ry. Co. v. Wagner, 153 Ind. 420; *Brown v. Butterley Coal Co.*, 2 Times Law R. 159.

³⁸ *Laming v. Webb* (Feb. 4, 1882) 72 Law T. 247.

³⁹ *Mobile & O. R. Co. v. George*, 94 Ala. 199; *Postal Telegraph Cable Co. v. Hulsey*, 115 Ala. 193; *Millward v. Midland Ry. Co.*, 14 Q. B. Div. 68; *Kellard v. Rooke*, 19 Q. B. Div. 585, 21 Q. B. Div. 367. *Supra*, § 66.

⁴⁰ *Mobile & O. R. Co. v. George*, 94 Ala. 199; *Hatfield v. Enthoven* (Dec. 31, 1881) 72 Law T. 157; *Barber v. Burt*, 10 Times Law R. 383; *Reynolds v. Holloway*, 14 Times Law R. 551; *Dolan v. Anderson*, 12 Rettle, Ct. Sess. Cas. (4th Ser.) 804; *supra*, § 66.

intended it to be performed in a more dangerous or unreasonable way than possible. The servant must exercise some care and discretion. But "unless the order itself implied to the contrary,—and its terms and the circumstances do not do so,—we are to presume it was intended by the foreman that the plaintiff should comply in a manner safe to himself."⁴¹

§ 69. Effect of clause on rules.

The employer is made liable for the act or omission of any person in his service, done in obedience to his rules or by-laws, or in obedience to the particular instructions given by any person delegated with the authority of the employer in that behalf.

At common law, a master was bound, where reasonable care required it, to establish and enforce proper rules and regulations for the conduct of his business, and if he failed so to do where the nature of his business required it, or if he adopted unsafe or improper rules, he was liable for the injuries resulting.⁴² Rules established in the business become a part of the contract made by the servant upon entry into the employment, and risk of injury from the impropriety of them was assumed, so far as the danger could be known to the servant by the exercise of reasonable care.⁴³

⁴¹ *Davis v. Western Ry.*, 107 Ala. 626, 633.

⁴² *Sword v. Cameron*, 1 D. Sess. Cas. (Scotch) 493; *Vose v. Lancashire & Y. Ry. Co.*, 2 Hurl. & N. 728; *Bartonshill Coal Co. v. McGuire*, 3 Macq. H. L. Cas. 300; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326; *Little Rock & M. R. Co. v. Barry* (C. C. A.) 84 Fed. 944. Must keep servants informed of them, *Louisville, N. A. & C. Ry. Co. v. Berkeley*, 136 Ind. 181.

⁴³ *Infra*, §§ 93, 109.

The acts of England, Alabama, and Indiana⁴⁴ contain provisions covering this subject, but it would seem that the liability of the employer was in no way extended by them. Indeed, it would seem that the clause of the English act which provides that if the rule or by-law has been approved by certain government "it shall not be deemed, for the purposes of this act, to be an improper or defective rule or by-law," has restricted his liability. An act done in obedience to a rule, by-law,

⁴⁴ 43 & 44 Vict. c. 42, § 1, subsec. 4: "By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf."

Section 2: "A workman shall not be entitled, under this act, to any right of compensation or remedy against the employer in any of the following cases, that is to say: * * * (2) Under subsection four of section one, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned: provided, that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of her majesty's principal secretaries of state, or by the board of trade, or any other department of the government, under or by virtue of any act of parliament, it shall not be deemed, for the purposes of this act, to be an improper or defective rule or by-law."

Civ. Code Ala. 1896, § 1749 (2590), subd. 4: "When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf."

Burns' Rev. St. Ind. 1901, § 7083 (Acts Ind. 1893, c. 130, § 1): "Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf."

or to particular instructions is really an act expressly authorized by the master, and such an act charged the master with responsibility at common law.

The English act provides that there shall be no recovery unless there be a defect or impropriety in the rules or by-laws, and that if they are approved by certain authorities they are not improper or defective. These qualifications are omitted in the acts of Alabama and Indiana. This omission cannot have the effect of rendering the employer liable irrespective of his want of care in framing or establishing them, or the reasonableness or propriety of the rules themselves. Negligence is in this clause, also, the basis of liability; but it may well be that the effect of the clause is to shift the burden of proof so that a plaintiff makes out his case by evidence of an injury caused by the act or omission of another, done in obedience to the rules or by-laws, and that then the burden is cast on the defendant of showing his due care in regard to them.

§ 70. Act or omission.

The words "act or omission of any person" mean the act or omission of any but the person injured.

The "act or omission" may be that of any one but the person injured; and thus, in a case under the clause in regard to rules, regulations, or by-laws, there are three persons concerned,—the employer who established the rules, the person who acted or omitted to act in obedience to them, and the servant who is injured through such act or omission. The care exercised by the person who did the act by which injury was caused is immaterial. A plaintiff was directed by his foreman to
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climb a telegraph pole in the course of his duty. The pole was rotten, and a spike which the plaintiff used fell out, causing his injury. He could not recover at common law, and "counsel for the plaintiff insist that this clause of the statute gives a right of action to an employe who has sustained an injury, without his fault, arising from the performance of any service rendered in obedience to the rules and regulations of the corporation, or in obedience to the particular instructions of any person delegated with the authority of the corporation in that behalf, without regard to the question of negligence or want of care of the corporation or its foreman. The contention is that the injury complained of resulted from the act of the plaintiff, done in obedience to the particular instructions given by the foreman, who had been delegated with authority in that behalf. According to the construction contended for, the clause would read, '* * * where such injury resulted from the act or omission of the person injured, or any other person.' * * * The phrase, 'where such injury resulted from the act or omission of any person,' is broad enough to embrace the injured person. The expression, 'any person,' in its usual and ordinary sense, is inclusive, and embraces every employe. This clause of the statute is not free from ambiguity. While the language employed is capable of a construction as broad as is contended for, it will not be given such construction if to do so would lead to absurd or unjust consequences. * * * The construction contended for would make every corporation, except municipal, an insurer of the safety of its employes from injury in all cases where they were injured without their fault, while

acting in obedience to the rules or instructions of their employer. * * * No principles of justice or sound policy can be invoked in support of a construction which would condemn the employer to compensate an employee for an injury for which the employer was in no wise in fault. The statute is susceptible of a construction which does no violence to the language employed, and which will protect the just rights of the employee, and at the same time hold the employer to respond in damages for injuries resulting from its fault or negligence, or from the fault or negligence of any person delegated with authority to represent it. The true construction of the clause requires the words 'any person' to be limited so as not to include the person injured. * * * The injury complained of did not result from the act or omission of a fellow servant, done or made in obedience to any rule, regulation, or by-law of the corporation, or in obedience to the particular instructions of the defendant's foreman, nor is it shown to have resulted from any fault or want of care of either."⁴⁵

Where an act or omission is done or made in obedience to "particular instructions," it would seem that there were four persons concerned,—the employer, who gives certain instructions or who authorizes another to give them, the person who transmits the instructions or who is authorized to give them, the person who acts or omits to act in obedience to them, and the servant who is injured by such act or omission. Here, again, the negligence to be sought is in the person giving the particular instructions, and not the person who acts or omits to act in obedience to them. Thus, in a case where a serv-

⁴⁵ *Dixon v. Western Union Tel. Co.*, 68 Fed. 620, 634.

ant told the plaintiff to cut down a tree, and then failed to warn him that another might fall on him, it was held that the master was not liable. "The constituents of the right of action given by the provision * * * are: First, that the injury must have been caused by reason of the *act* or *omission* of some person in the service or employment of the master; * * * and, second, that such act or omission of such person must have been done or made in obedience to particular instructions given him by some person delegated with the authority of the master or employer in that behalf. The delegation of authority here spoken of is not to the person whose 'act or omission' caused the injury, but to some other person who was authorized by the master to give the servant whose act or omission caused the injury particular instructions to do the act or suffer the omission."⁴⁶

That the words "act or omission" cannot refer to the act or omission of the injured servant seems clear. "The appellee's construction of this specification is that if any duty is enjoined by rule, etc., upon a servant, and the duty is omitted or neglected, the corporation is liable for resulting injury. If this was the proper construction of the specification, there would be little requirement for other provisions of the act than those of the third subdivision, since it would strike down the fellow-servant rule in its entirety wherever the act or omission is in the line of duty. It would make the corporation liable for the act or omission of a servant, whether negligent or not, and whether the duty negligently performed or negligently omitted may have been enjoined

⁴⁶ Postal Telegraph Cable Co. v. Hulsey, 115 Ala. 193.

by the general rules, etc., of the corporation, or is in obedience to particular instructions from one 'delegated with authority in that behalf.' Such was not the intention of the legislature. On the contrary, we think there can be no doubt that it was intended by the third subdivision to make corporations liable where the servant does an act or omits action in obedience to the command of the corporation given by rule, regulation, or by-law, or through any person delegated with authority from the corporation to make the command, and such act or omission results in injury to another."⁴⁷

It would also seem clear that the act or omission of the servant made in obedience to rules, regulations, by-laws, or particular instructions need not be negligent, and the inquiry as to the negligence of it is immaterial. If it is a thing enjoined by the rules or instructions, and is done in obedience to them, and injury results, the fault lies in the rules or instructions which prescribe such an act, and the question of negligence is pertinent only as to them.

§ 71. Obedience.

The act or omission must be done or made in obedience to the rules, by-laws, or particular instructions.

It is only where the act or omission is done or made in obedience to the rules or instructions that an action lies under the statute. "When the master commands or instructs, by rules and regulations and by-laws of himself, or in obedience to particular instructions given

⁴⁷ Baltimore & O. S. Ry. Co. v. Little, 149 Ind. 167, 171. Rule made it brakeman's duty to open and close switch, and he failed to close it. Not within act.

by any person delegated by him with his authority in that behalf, and an employe obeys and carries out such commands or instructions, and injury is done thereby to a fellow employe, the master is liable. The statute has reference by its terms to the instructions of the master, and makes him responsible for them; and when he commands that an act be done or omitted to be done, and the servant obeys, in doing the thing commanded to be done, or in omitting to do what he was ordered not to do, his obedience in either case is the act of the master, and, if injury results, he is liable; but if the servant disobeys the instruction so given him, by doing something else that he was not instructed to do, or omits to obey instructions at all, and injury to his fellow servant is the result, it is not the act or command of the employer that caused the injury, but the disobedience of the employe, and the master is not liable."⁴⁸ Thus, where a servant had two duties,—that of attending to an engine and working at a circular saw,—he had received particular instructions to attend to the engine. While he was holding one end of a board which the plaintiff was sawing, he thought the engine needed attention, and, without giving notice, let go the board, whereby the plaintiff was injured. It was held that the plaintiff could not recover; that obedience to the instructions did not require him, when it was necessary to attend to the engine, to leave the saw without giving his mate notice.⁴⁹

⁴⁸ *Laughran v. Brewer*, 113 Ala. 509, 518. Engineer omitted to obey rules relating to stopping and starting machinery. Not within act.

⁴⁹ *Whatley v. Holloway*, 6 Times Law R. 190, 6 Times Law R. 353.

§ 72. Rules, by-laws, and particular instructions.

"Rules, regulations, and by-laws" refer to the general rules established by a master for the conduct of his business.

"Particular instructions" refer to the incidental or special directions which he may give at any time as to some detail of the work.

The rules, regulations, and by-laws relate to the general conduct or management of the business. It would seem that they may be oral as well as written. They must be promulgated by the employer and brought to the attention of the servants. The master is responsible only where they are so framed that obedience to them causes injury to others, and it would seem that by this clause the common-law liability of the master is not extended. A failure to provide any rules, regulations, or by-laws, although the nature of the business required them, would not come within the act, and a plaintiff would have to seek his remedy at common law.

The reasonableness of rules deliberately adopted and acted on is a question of law for the court, and not of fact for the jury.⁵⁰

Particular instructions are, it would seem, those given by the employer personally. They must be specific rather than general, and direct a certain thing to be done, rather than some general end or object to be accomplished. Little discretion is given to the actor in obeying them, yet, as the most specific direction to do a thing implies the performance of minor acts aiding the accomplishment of it, these subsidiary acts, so far as they are necessarily implied in the direction, are done in obedience to it. But if the actor carries out the direc-

⁵⁰ Little Rock & M. R. Co. v. Barry (C. C. A.) 84 Fed. 944.

tion in an unreasonable or careless way, when he might gain the same end safely, such a method will not be held to have been implied in the instructions.⁵¹

The construction of the words, "particular instructions given by any person delegated with the authority of the employer in that behalf," gives rise to some doubt. They seem to refer to a person who is invested with the master's power to give instructions; but it has been suggested that they mean a person who is only authorized to transmit the master's instructions, and is a conduit pipe between the master and the servant who is to act upon them. If the words refer to a person authorized to give instructions himself, then they describe both a "superintendent" and a person to whose orders the plaintiff is bound to conform; but both these classes of employes are made the subjects of separate clauses in the act, and as to such servants this provision is not necessary. It may, however, refer to a servant who does not, otherwise, fill the description of a "superintendent," and for whose negligence there is no remedy under the section relating to conformity to orders in a case where, not the person conforming to them, but another, is injured. If such were the true construction, this clause would create a new variety of superintendent, with like powers, though exercised in a more limited field. In regard to such a construction it may be noted that the clause does not, like the preceding ones, require that the "person" should be "in the service of" the employer, and the liability would attach if a special agent, not in the common employment, should be authorized to give particular instructions, and the fellow-servant doctrine

⁵¹ *Whatley v. Holloway*, 6 Times Law R. 190, 6 Times Law R. 353.

might not be affected. Then, also, the place in the act where this clause is found is entitled to some weight. It is joined with the "rules, regulations, or by-laws of the employer," while if it refers to a new type of servant it ought more logically to be found either in the "superintendence" or "conformity to orders" clauses. On the other hand, if it be said that the clause refers only to a person who is a conduit pipe to carry the personal directions of the master, then it has not affected in any way the master's liability, since it would be his personal negligence in giving such instructions, and for that he was liable at common law. It is believed that the latter is the true construction of the enactment.⁵²

⁵² See *Claxton v. Mowlem*, 4 Times Law R. 756, where a workman, in course of his duty, called to the driver of a crane to "lower away," and the bucket fell and injured the plaintiff. It was held not within the act. "The banksman * * * gave no instructions to any one; he merely gave notice. But assuming that he did give orders, a person who was told to do a particular thing was not 'delegated with the authority of the employer.' Those words referred to a manager, or a person in the position of a manager, who was put into the position of his employer to do or to abstain from doing what the employer would do or abstain from doing. If there was any negligence here it was in the banksman, and he was nothing more than a fellow servant."

CHAPTER VII.

RAILROAD EMPLOYEES.

- § 73. Effect of Act.
- 74. Charge or Control.
- 75. When Negligence must Occur.
- 76. Signals, Points, and Switch.
- 77. Locomotive Engine.
- 78. Cars.
- 79. Train.
- 80. Upon a Railway.
- 81. Indiana Clause.

§ 73. Effect of act.

In addition to the other remedies, the act gives to employes of steam railroads a remedy for the negligence of such fellow servants as are at the time in charge or control of certain parts of the equipment.

The burdens of the fellow-servant rule have pressed more heavily upon railway employes than upon any other class of servants, and the reasoning upon which the doctrine is founded has in no other business proved more fallacious. The business is of a dangerous character, and the extension of railroad systems and the increasing amount of traffic bring about a greater proportion of injuries. From the Twelfth Annual Report of the Interstate Commerce Commission it appears that, of the whole number of men employed in railway service in the United States during the year, one out of every four hundred and twenty was killed, and one out of every twenty-seven injured. The statistics in regard

to passengers show that of over two million carried but one was killed, and of over four million carried but one was injured. Carelessness on the part of the injured is responsible for a large proportion of the accidents among employes, but the figures given lead to the inference that the railroads use care in furnishing proper roadbeds, rolling stock, and appliances, and in hiring competent servants and adopting proper methods of work. Few injuries can be traced to a failure in these personal duties of the master compared with the number which are caused by the negligence of fellow servants in coupling cars, moving trains, switching, and such acts which are generally done by men occupying inferior positions and coming within the definition of fellow servants rather than delegates of the master. For all injuries arising from such acts the common law gives no remedy, and this hardship has been redressed in many states by the enactment of statutes removing or limiting the defense of fellow service in the case of railroad employes.¹ The employers' liability acts of

¹ Certain statutes limit the defense of fellow service, but do not entirely remove it; others abrogate it entirely.

St. Ark. c. 130, § 6248: "All persons engaged in the service of any railway corporations, foreign or domestic, doing business in this state, who are intrusted * * * with the authority of superintendence, control, or command of other persons in the employ or service of such corporation, or with the authority to direct any other employe, in the performance of any duty of such employe, are vice principals of such corporation, and are not fellow servants with such employe."

Section 6249: "All persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being intrusted by such corporations with any superintendence or control over their fellow employes, are fellow servants (322)

England, Alabama, Massachusetts, Colorado, and Indiana² have likewise favored the employes of railroads

with each other: provided, nothing herein contained shall be so construed as to make employes of such corporation in the service of such corporation fellow servants with other employes of such corporation engaged in any other department or service of such corporation. Employes who do not come within the provisions of this section shall not be considered fellow servants."

Laws Utah 1896, c. 24, § 1: "That all persons engaged in the service of any person, firm, or corporation, foreign or domestic, doing business in this state, who are intrusted by such person, firm, or corporation as employer with the authority of superintendence, control, or command of other persons in the employ or service of such employer, or with the authority to direct any other employe in the performance of any duties of such employe, are vice principals of such employer, and are not fellow servants."

Section 2: "That all persons who are engaged in the service of such employer, and who, while so engaged, are working together at the same time and place to a common purpose, of the same grade of service, neither of such persons being intrusted by such employer with any superintendence or control over his fellow employes, are fellow servants with each other: provided, that nothing herein contained shall be so construed as to make employes of such employer in the service of such employer fellow servants with other employes engaged in any other department of service of such employer. Employes who do not come within the provisions of this section shall not be considered fellow servants."

St. Wis. 1898, c. 87, § 1816: "Every railroad company operating any railroad which is in whole or in part within this state shall be liable for all damages sustained within the same by any of its employes without contributory negligence on his part: (1) When such injury is caused by a defect in any locomotive, engine, car, rail, track, machinery, or appliance required by said company to be used by its employes in and about the business of their employment, if such defect could have been discovered by such company by reason-

² 43 & 44 Vict. c. 42, § 1: "(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway."

Civ. Code Ala. 1896, § 1749 (2590): "(5) When such injury is caused

above those engaged in other occupations by inserting a clause designed exclusively for their benefit.

able and proper care, tests, or inspection; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company. (2) When any such employe is so engaged in operating, running, riding upon, or switching passenger, freight, or other trains, engines, or cars, and while engaged in the performance of his duty as such employe, and which such injury shall have been caused by the carelessness or negligence of any other employe, officer, or agent of such company in the discharge of or for failure to discharge his duties as such."

Rev. Code N. D. 1899, § 3072: "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in switching or in the operation of trains by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part when sustained within this state: * * * provided, that nothing in this article shall be so construed as to render any railroad company liable for damages sustained by any employe, agent, or servant while engaged in the construction of a new road, or any part thereof, not open to public travel or use."

Ann. Code Iowa 1897, § 2071: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employes, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed. * * *"

Laws Ohio 1890, p. 149, § 3; Bates' Ann. St. p. 1900, § 3: "That in all actions against a railroad company for personal injury to or death resulting from personal injury of any person while in the employ of such company, arising from the negligence of such company

by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive engine, switch, car, or train upon a railway or of any part of the track of a railway."

Rev. Laws Mass. c. 106, § 1, cl. 3 (Acts 1887, c. 270, § 1, cl. 3):
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The purpose of this enactment is more effectually to protect employes of railroad companies from the peculiar dangers of that business. It applies only to

or any of its officers or employes, it shall be held, in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employe of such company, is not the fellow servant, but superior, of such other employe; also, that every person in the employ of such company having charge or control of employes in any separate branch or department shall be held to be the superior, and not fellow servant, of employes in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

Laws Miss. 1898, c. 66, § 1: "Every employe of any corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employes as are allowed by other persons not employes, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employe injured of the defective or unsafe character or condition of any machinery, ways, or appliances, or of the improper loading of cars, shall not be defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." See *Brooks v. Mississippi Cotton-Oil Co.* (Miss.) 25 So. 479.

Civ. Code Mont. p. 955, § 905: "In every case, the liability of the corporation to a servant or employe acting under the orders of his superior shall be the same in cases of injury sustained by default or wrongful act of his superior, or to an employe not appointed or controlled by him, as if such servant or employe were a passenger."

St. Minn. 1894, § 2701: "Every railroad corporation owning or

"The negligence of a person in the service of the employer who was in charge or control of a signal, switch, locomotive engine, or train upon a railroad."

Rev. Laws Mass. c. 106, § 1, cl. 3 (Acts 1897, c. 491, § 2): "Who-

railroad employes, and whether or not a case comes within its terms depends first upon the question whether

operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof, * * * without contributory negligence on his part, when sustained within this state: * * * provided, that nothing in this act shall be so construed as to render any railroad company liable for damages sustained by any employe, agent, or servant while engaged in the construction of a new road, or any part thereof, not open to public travel or use."

Comp. Laws Wyo. 1876, c. 97: "Any person in the employment of any railroad company in this territory who may be killed by any locomotive, car, or other rolling stock, or other property of said company, whether in the performance of his duty or otherwise, his widow or heirs may have the same right of action for damages against such company as if said person so killed were not in the employ of said company; * * * and any person in the employ of said company who may be injured by any locomotive, car, or other rolling stock of said company, or by other property of said company, shall have his action for damages against said company the same as if he were not in the employ of said company. * * *"

Laws N. M. 1893, c. 28: "Every corporation operating a railway in this territory shall be liable in a sum sufficient to compensate such employe for all damages sustained by any employe of such corporation, the person injured or damaged being without fault on his or her part, occurring or sustained in consequence of any mismanagement, carelessness, neglect, default, or wrongful act of any agent or employe of such corporation, while in the exercise of their several duties, when such mismanagement, carelessness, neglect, default, or wrongful act of such employe or agent could have been avoided by such corporation through the exercise of reasonable care or diligence in the selection of competent employes or agents, or by not overworking said employes, or requiring or allowing them to work an unusual or unreasonable number of hours. * * *"

Gen. Laws Tex. 1897, c. 6, § 1: "That every person, receiver, or corporation operating a railroad or street railway the line of which shall be situated in whole or in part in this state shall be liable for

ever, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive engine, or train, shall be deemed to be a person in charge or control of a

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it is an injury received in operating a "railroad," as that word was understood by the framers of the act. "Rail-

all damages sustained by any servant or employe thereof while engaged in the work of operating the cars, locomotives, or trains of such person, receiver, or corporation, by reason of the negligence of any other servant or employe of such person, receiver, or corporation, and the fact that such servants or employes were fellow servants with each other shall not impair or destroy such liability."

Section 2: "All persons engaged in the service of any person, receiver, or corporation controlling or operating a railroad or street railway the line of which shall be situated in whole or in part in this state, who are intrusted by such person, receiver, or corporation with the authority of superintendence, control, or command of other servants or employes of such person, receiver, or corporation, or with the authority to direct any other employe in the performance of any duty of such employer, are vice principals of such person, receiver, or corporation, and are not fellow servants with their coemployees."

Section 3: "All persons who are engaged in the common service of such person, receiver, or corporation, controlling or operating a railroad or street railway, and who, while so employed, are in the same grade of employment and are doing the same character of work or service and are working together at the same time and place, and at the same piece of work and to a common purpose, are fellow servants with each other. Employes who do not come within the provisions of this section shall not be considered fellow servants."

Priv. Laws N. C. 1897, c. 56: "That any servant or employe of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant or employe who shall have suffered death, in the course of his services or employment with said company, by the negligence, carelessness, or incompetency of any other servant, employe, or agent of the company, or by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company."

Rev. St. Mo. 1899, § 2873: "That every railroad corporation own-

signal, switch, locomotive engine, or train within the meaning of the above provision."

Sess. Laws Colo. 1893, c. 77, § 1; Mills' Ann. St. 1891-96, § 1511a:
"(3) By reason of the negligence of any person in the service of the

road" means a permanent track over which goods or passengers are conveyed from place to place in vehicles

ing or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof: provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury."

Gen. St. Kan. 1901, § 5858: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes to any person sustaining such damage."

Rev. St. Fla. c. 4071, § 3: "If any person is injured by a railroad company by the running of the locomotives or cars or other machinery of such company, he being at the time of such injury an employe of the company, and the damage was caused by negligence of another employe, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery."

Civ. Code Ga. § 2323: "If the person injured is himself an employe of the company, and the damage was caused by another employe, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

See Sess. Laws Colo. 1901, c. 67.

On the other hand, see:

Civ. Code Cal. § 1970: "An employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe."

Pepper & Lewis' Pa. Dig. vol. 2, p. 3957, § 137: "Where any person shall sustain personal injury or loss of life while lawfully en-

employer who has the charge or control of any switch, signal, locomotive engine, or train upon a railroad."

Burns' Rev. St. Ind. 1901, § 7083 (Acts Ind. 1893, c. 130, § 1): "Fourth. Where such injury was caused by the negligence (328)

propelled by the use of steam. An electric railroad does not come within the meaning, but the test is not so much the motive power employed, as the dangers liable to arise

gaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employe, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employe: provided, that this section shall not apply to passengers."

These railroad statutes have been uniformly held constitutional. *Supra*, § 4. In the states where the statute applies only to certain specified employes, or to work performed under certain conditions, the common law still governs such cases as are not brought within the terms of the act. In all cases it must appear that the plaintiff himself was in the exercise of due care, whether or not, by the terms of the statute, this is made a requisite of recovery. Neither is the defense of assumption of risk affected by these statutes save in so far as it applies to the fellow-servant exemption.

The courts, in construing statutes, do not lightly abrogate the common-law defense of fellow service, though they will not construe such acts so strictly as to deprive the servant of any rights which he may have at common law. The statute must apply clearly to employes, and expressly provide that fellow service shall not be a bar to recovery, else the rights given will be read in the light of the common-law rules.

Rev. Laws Mass. c. 111, § 267 (Pub. St. Mass. c. 112, § 212), permitting the recovery of damages for death when a passenger or stranger is killed by a railroad, was amended (Acts 1883, c. 243) by adding the words, "and if an employe of such corporation, being in the exercise of due care, is killed under such circumstances as would have entitled the deceased to maintain an action for damages against such corporation if death had not resulted, the corpo-

of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine, or train upon a railway, or where such injury was caused by the negligence of any person, co-employe, or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow servant, at the time act-

in the prosecution of the business. Whatever the nature of the railroad, it must possess substantially the same characteristics, in the way of tracks, vehicles, switches, signals, etc., and give rise to substantially the same dangers, as are found in the steam railroads known to the framers of the act.³

Under the act, a railway servant is effectually protected, for he has the remedies given by the clauses in regard to defects in ways, works, and machinery, and the negligence of persons intrusted with general or limited superintendence, and, in addition, a remedy for the negligence of one who would ordinarily be regarded a fellow servant in the strictest sense, if that servant is in charge or control of any of the specified parts of the equipment. This is the only clause in the act which

ration shall be liable in the same manner and to the same extent as it would have been if the deceased had not been an employee." As to this provision, the court has said: "The purpose of the statute is to permit the administrator to maintain an action for the death when the intestate could have maintained an action if he had recovered, and not otherwise. When his action would have been defeated by the defense of common employment if he had sued, the action of his administrator will be barred in the same way in a suit brought on account of his death." *Dacey v. Old Colony R. Co.*, 153 Mass. 112, 117. See, also, *Daley v. Boston & A. R. Co.*, 147 Mass. 101; *Peaslee v. Fitchburg R. Co.*, 152 Mass. 155; *Goodes v. Boston & A. R. Co.*, 162 Mass. 287. The employers' liability act cannot be coupled with this statute so as to give an administrator a right of action under the railroad act which would not otherwise exist. *Clark v. New York, P. & B. R. Co.*, 160 Mass. 39.

ing in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws,"

³ *Infra*, § 80, note 48.

gives a remedy for an act of manual labor negligently performed by a servant, since the "charge or control" may be a charge by giving orders or a control by the application of physical force. The character of the act is the test, and the relative grade or rank in the service of the negligent servant is not material.⁴ If a person is found to be in "charge or control," the act takes from the master the defense of fellow service, and permits recovery.

§ 74. Charge or control.

The words "charge or control" refer to a person who has either the general oversight or charge or the actual physical manipulation or control of any specified parts of the equipment of a railway.

Although the words "charge or control" may properly include persons who are intrusted with duties of superintendence or care of the ways, works, and machinery, yet, as special provision is made for such persons in the preceding clauses of the act, it has been held that the words refer to servants not included in those clauses. A person is not in "charge or control," within the meaning of the act, whose duties are primarily those of a superintendent, or who is intrusted with the duty of seeing that the ways, works, or machinery are in proper condition.⁵ The words refer to a fellow servant whose grade or relative rank in the service is immaterial;⁶ and it is no objection that the negligent act was one of

⁴ *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240; *Culver v. Alabama M. R. Co.*, 108 Ala. 330, 335; *Steffe v. Old Colony R. Co.*, 156 Mass. 262.

⁵ *Birmingham Ry. & E. Co. v. Baylor*, 101 Ala. 488.

⁶ *Supra*, § 73.

manual labor rather than of direction, if the act is one of charge or control of a part of the equipment. The master is liable for the negligence of a servant "who is in the charge or control of signal points, cars, etc., although such person, when negligent, is voluntarily assisting in manual labor."⁷

The words "charge or control" mean different things, and refer to acts of different kinds. In an early case under this section it appeared that the workman whose negligence was complained of attended to the oiling and cleaning of the points and locking devices, but was subject to the orders of a superior, who had general oversight of this apparatus. The workman, having oiled the points, neglected to replace the cover, whereby the injury happened. It was held that the plaintiff could not recover, and in the court below it was said: "Now, certainly, there was a person in this case who had the 'control' of the points. They are worked by the man in the signal box by means of a highly complicated piece of mechanism; undoubtedly he had 'control' over them under subsection 5. It is not suggested that Fisher [the negligent servant] had 'control' over the points, but it is said that he had 'charge' of them. What is the meaning of a person having the 'charge or control' of the points? I doubt whether the words 'charge' and 'control' are intended to mean different things. If they are, and if the man in the signal box was not the person in this case who had both charge and control of the points, possibly Saunders, the inspector, had charge, and the man in the signal box had control." The decision was affirmed above, where it was said: "I cannot think that

⁷ Kansas City, M. & B. R. Co. v. Burton, 97 Ala. 240.

there is any colour for saying that he had the control of the points, and the only question is whether he is a person who had the charge of them, within the meaning of the statute. I think that to be such a person he should be one who has the general charge of the points, and not one who merely has the charge of them at some particular moment.”⁸

In a case which went to the house of lords it appeared that the engineer was engaged in moving cars, one at a time, to a place where they were to be unloaded, and the fireman “scotched” the wheels of the others to prevent their running down; but he did this negligently, and the plaintiff was injured. “What is the section made to guard against? The danger to employes of a company from the moving of a train from place to place along the line. That is the source of danger,—the only way in which an accident can happen. Now, why has not the person upon whose act it depends whether a train moves or does not move, ‘control of the train’? It is the only sense in which any one has ‘control’ of a train, as it seems to me, within the meaning of the section, namely, that he can make it move or not move, as he pleases. If, therefore, you can detach that operation so as to free the engine driver from all liability, as soon as he has left the proper person to scotch, and let him go on, it seems to me, I confess, to follow that then the person so left to prevent that train from moving beyond the point at which it was intended to remain cannot be said to be otherwise ‘in charge or control’ of the train. It seems to

⁸ *Gibbs v. Great Western Ry. Co.*, 11 Q. B. Div. 22, 25, 12 Q. B. Div. 208, 212.

me that the word 'control' is perfectly appropriate to what he has to do in relation to it, namely, control its motion or prevent its moving."⁹

The question whether "charge" and "control" are to be taken separately and given different meanings has been the subject of decision in Massachusetts. A train was being switched under the supervision of the conductor. Brakemen were on detached cars, and the foreman of the switching gang directed on which tracks the train was to be placed. Inasmuch as all were under the supervision of their superior, the conductor, it was held that neither the brakemen nor the foreman came within the act. The court said: The words "are to be regarded, not, perhaps, as synonymous, but as explanatory of each other, and as used together for the purpose of describing more fully one and the same thing. * * * If 'control' is one thing and 'charge' is another, then, inasmuch as to some extent every brakeman upon a train would have 'control' of it, every employe injured by an accident resulting from the carelessness of a brakeman would have a right of action against the corporation which employed him, and the defense of common employment as to brakemen would be done away with, even though the brakeman might be acting under an immediate superior. The statute is to be fairly construed, and, while it removes the defense of common employment in some cases, it does not extinguish it altogether, and we do not think that the legislature intended that it should be abolished in all cases where injuries were sustained by the carelessness of a brakeman. If it had, it would have used language

⁹ *McCord v. Cammell & Co.* [1896] App. Cas. 57, 67.

more truly descriptive of a brakeman's usual occupation than the words 'any person in the service of the employer who has the charge or control of any * * * train upon a railroad.' It is *the* charge or control of which the statute speaks, and not *a* charge or control, and it is the charge or control of a train as a connected whole which is meant, not of portions which together form a whole. * * * We think, therefore, that by the words 'any person * * * who has the charge or control' is meant a person who, for the time being at least, has immediate authority to direct the movements and management of the train as a whole and of the men engaged upon it. * * * The mere fact that a laborer or brakeman is put in such a position that for the moment he physically controls and directs its movements under the eye of his superior does not of itself constitute him a person in the 'charge or control' of the train, though there may be circumstances under which he would have such charge or control."¹⁰ Since the decision in this case the Massachusetts legislature has passed an act declaring that "whoever, as a part of his duty for the time being, physically controls or directs the movement of a signal, switch, locomotive engine, or train shall be deemed to be a person in charge or control."¹¹ The effect of this decision has been still further weakened by a recent case, where the tower man in a railroad yard misplaced a switch and injured the plaintiff. The tower man received directions how to place the switch from the conductor of the train. "The movements which

¹⁰ Caron v. Boston & A. R. Co., 164 Mass. 523, 528.

¹¹ Rev. Laws Mass. c. 106, § 1, cl. 3 (Acts Mass. 1897, c. 491, § 2, which omitted locomotive engine); *supra*, note 2.

were to be made with the cars were entirely under the control of the men on the ground, and all that the man in the tower had to do was to make the movements, by throwing his lever, required to carry out the signals and orders given him by the conductor or the switchman." The court said: "We think it plain that the tower man, whose duty it was to move the switch, was a person in 'charge or control of * * * any switch,' within the meaning of St. 1887, c. 270, § 1, cl. 3. Even if another person gave him directions or exercised supervision over him in such a way as to be in charge of a switch in a broad sense, so that the railroad company might be liable for his negligence in giving or failing to give proper directions, we are of opinion that, situated in the tower as he was, having complete manual control of the switch after receiving signals and orders from one below, his control and charge for the time were of a kind contemplated by the framers of the statute."¹²

The words "charge" and "control" should be construed, as they are written, separately, and with distinct meanings. They are applicable to both men and machinery, and, from the context, must bear necessarily the sense of authority to direct men by orders and of power to direct machinery by physical force. They are apt words, therefore, to describe the duties of a conductor of a train, an engineer of a locomotive, or a signal man in his box. There is no inconsistency in one person having the general charge, and another the physical control, over any of the equipment mentioned, and either or both being negligent. And thus it would seem

¹² Welch v. New York, N. H. & H. R. Co., 176 Mass. 393, 398.
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that, whether the act causing the injury were performed in the presence of an immediate superior or not, if it were an act of a person in charge or in control, in either sense in which these words may be taken, and is negligent, there is a cause of action. If authority were the paramount meaning, "control" would be superfluous, and the whole section would but slightly extend the master's liability beyond what had already been done in the preceding sections relating to general or limited superintendence. This is the only section which can give a remedy for the negligent performance of a manual act, and, as the risk of danger from acts of that character is the greatest that railroad employes have to assume, it must have been the intention of the legislature, by enacting a separate clause for their benefit, to give them as complete a remedy as possible.

The words of the statute "do not * * * necessarily point to *one* person who is in charge of the whole train. Different duties * * * may be assigned to different persons, and in that case each and all of those persons are charged with the conduct of the train; and, if any one of them be negligent in his own department, that will constitute 'negligence,' bringing the case within the terms." "The statute points directly to the person having 'the charge or control of the train' as being that person who, at the time when the negligent act is committed, has the duty laid upon him of performing that act with reasonable care."¹³

¹³ *McCord v. Cammell & Co.* [1896] App. Cas. 57, 65, 66; *Caron v. Boston & A. R. Co.*, 164 Mass. 523, 529. "It is possible that more than one person may have the 'charge or control' of a train at the same time." *Haysler v. Great Western Ry. Co.* (Dec. 17, 1881) 72 Law T. 120 (both engineer and fireman in control).

In each particular case the time, place, and circumstances must determine the question of immediate control, and this question is ordinarily one of fact for the jury under proper instructions.¹⁴

§ 75. When negligence must occur.

The negligence of a person in charge or control means a negligent use of the equipment for a proper purpose.

Negligence of a person in charge or control must be shown by the plaintiff. This negligence must, moreover, be in an act which is itself an act of charge or control, and not negligence committed by a person during the period in which he is in charge or control, but not otherwise connected with it. Thus, a servant whose duty it is, under the general direction of a superior, to oil and repair machinery connected with the points, and who fails to replace the cover of a box, after oiling, whereby the plaintiff is injured, is not only not within the meaning of the words "charge or control," but his negligent act is not an act of "charge or control." "The legislature had in contemplation the negligence of some person having charge or control of the points for the purposes of traffic and of movement."¹⁵ Thus, if a signal man in his box should be in the actual management or control of his signals, yet should permit a wrench to fall from the window upon the plaintiff, this would be a negligent act which, though occurring during the period of his "charge or control," is not in itself an act of charge or

¹⁴ *Louisville & N. R. Co. v. Richardson*, 100 Ala. 232. A question "whether or not, after the caboose was cut off, you assumed any management of the train," is admissible. *Caron v. Boston & A. R. Co.*, 164 Mass. 523.

¹⁵ *Gibbs v. Great Western Ry. Co.*, 11 Q. B. Div. 22.

control, and does not tend to vary or control the movements of men or of machinery.¹⁶ A person, it would seem, is not in charge or control, and therefore not negligent within the act, unless he is handling or directing an instrumentality for a purpose for which it was intended, and his negligence consists in a careless use of it for a proper purpose.

§ 76. Signals, points, and switch.

The word "switch" is omitted in the acts of England and Indiana, but in England it would seem to be included in "points" which are the movable rails and the devices which turn the wheels of a car from one line of track to another.

A fireman who, as part of his duties, receives and transmits signals to the engineer, is in charge and control of signals under the act.¹⁷ A watchman at a bridge is in charge and control of signals.¹⁸ A person who cleans and oils the points under a superior is not in charge or control of them, and his negligence in leaving a cover where it causes injury does not make the company responsible.¹⁹ A tower man may be in control

¹⁶ Compare sections 62, 67, *supra*.

¹⁷ *Richmond & D. R. Co. v. Jones*, 92 Ala. 218; *Brown v. Louisville & N. R. Co.*, 111 Ala. 275; *Louisville & N. R. Co. v. Brown*, 121 Ala. 221.

¹⁸ *Columbus & W. Ry. Co. v. Bridges*, 86 Ala. 448. "If he gives a signal in obedience to the rules of the company, but improperly, the plaintiff may recover; but if the signal is not given in accordance with the rules, and the plaintiff, knowing the rules, relies upon the signal, he cannot recover."

¹⁹ *Gibbs v. Great Western Ry. Co.*, 11 Q. B. Div. 22, 12 Q. B. Div. 208.

of a switch, although he operates it as directed by a superior.²⁰ A person who is in control of a switch is not also in control of a train.²¹ If the engineer or conductor has keys by which he may open a switch, he is for the time being in charge and control of it; and a section foreman, where no person is specially appointed to attend to it, is not by virtue of his position in charge or control of the switches.²²

§ 77. Locomotive engine.

"Locomotive engine" means an engine used for the purpose of moving cars on the track of a railway.

"The term 'locomotive engine' has a well-known significance, and is used generally for an engine to draw a train of trucks or cars along a permanent or temporary set of rails," and it is to be read in the act as having that meaning. Thus, a traveling crane used to lift heavy weights is not a locomotive engine.²³ In the Alabama clause a comma is placed between "locomotive" and "engine," and the question arose whether a man in charge and control of a stationary engine, whereby cars were moved on a tramway in a mine, came within the act, and it was held that this was not an "engine on the track of a railway," and consequently the negligent person was a fellow servant.²⁴ But where the negligent servant was in charge of a stationary engine which

²⁰ *Welch v. New York, N. H. & H. R. Co.*, 176 Mass. 393.

²¹ *Fairman v. Boston & A. R. Co.*, 169 Mass. 170.

²² *Birmingham Ry. & E. Co. v. Baylor*, 101 Ala. 488; *Cowen v. Ray* (C. C. A.) 108 Fed. 320. A brakeman sent forward to place torpedoes is for the time being in charge of a signal.

²³ *Murphy v. Wilson*, 52 Law J. Q. B. 524, 525.

²⁴ *Whatley v. Zenida Coal Co.*, 122 Ala. 118

hauled freight cars to a place where they were to be unloaded, and the count was upon the negligence of a person in charge of a train, and not in charge of a locomotive engine, it was held that he came within the act.²⁵

A street car operated by electricity is not a locomotive engine or train upon a railroad. "By the words 'locomotive engine or train upon a railroad' must be understood railroad and locomotive engines and trains operated and run or originally intended to be operated and run in some manner and to some extent by steam. This undoubtedly was the sense in which the words were used by the legislature when the statute was enacted, and we do not feel justified now in giving to them the broad construction for which the plaintiff contends. Possibly, a railroad, when the motive power has been changed in part or altogether from steam to electricity, or some other mechanical agency, but which retains in other respects the characteristics of a steam railroad, would come within the purview of the act."²⁶

While running the engine and performing the labor himself, the engineer has charge or control of it.²⁷ "Generally, we would say, especially when he is on and running the engine, * * * that the engineer has control of it. It may be, however, when he is not in the active manipulation of it that other persons control it. It will not do to say, therefore, as a matter of law, *who* has the control or charge of an engine at any particular time, when it is fairly inferable from the evidence that

²⁵ Cox v. Great Western Ry. Co., 9 Q. B. Div. 106.

²⁶ Fallon v. West End St. Ry. Co., 171 Mass. 249.

²⁷ Perdue v. Louisville & N. R. Co., 100 Ala. 535; Culver v. Alabama Ry. Co., 108 Ala. 330, 335.

either one or the other of two persons may have such control. In each particular case, time, place, and circumstance must determine the question of immediate control."²⁸ Even though the engineer is on the engine, the fireman may be in charge or control if he performs duties more properly belonging to an engineer, such as receiving signals.²⁹ At the same time it is possible that both engineer and fireman should each have charge and control.³⁰

Hostlers or caretakers may have charge or control of an engine after it has finished its run.³¹ The decision in Massachusetts has been otherwise. "The statute * * * 'seems chiefly to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who, either wholly or in part, control its movements.' This engine was stalled in the roundhouse for repairs, and was not upon a railroad track, as the words ordinarily are used. The case would be different, perhaps, if it had been standing on a track, waiting to be coupled to a train, or for some temporary purpose. If the engine had been in the repair shop, no one, we think, would contend that it was upon a railroad track, within the fair meaning of the act. The fact that it was in the roundhouse instead, where such repairs were made as could be made comfortably, does not, it seems to us, make any difference."³²

²⁸ Louisville & N. R. Co. v. Richardson, 100 Ala. 232.

²⁹ Brown v. Louisville & N. R. Co., 111 Ala. 275.

³⁰ Haysler v. Great Western Ry. Co. (Dec. 17, 1881) 72 Law T. 120.

³¹ Louisville & N. R. Co. v. Mothershed, 97 Ala. 261; Louisville & N. R. Co. v. Richardson, 100 Ala. 232.

³² Perry v. Old Colony R. Co., 164 Mass. 296, 301.

Cases of negligence on the part of a person in charge or control of an engine are collected below.³³

§ 78. Cars.

"Car" means a vehicle ordinarily used on railroads.

"It is argued that as the word 'car' is used in connection with the words 'locomotive,' 'engine,' and 'train,' it was intended to mean a vehicle used on a railway for the transportation of passengers or freight, which is propelled by a locomotive or engine and forms a part of a train. * * * As the clause of the statute which is under consideration has reference to injuries received in railway service, it seems plain that the word 'car,'

³³ Failure to warn when about to move engine, *Haysler v. Great Western Ry. Co.* (Dec. 17, 1881) 72 Law T. 120; *Clowes v. Atlantic Patent Fuel Co.* (Oct. 28, 1882) 73 Law T. 432; *Indianapolis Union Ry. Co. v. Houlihan* (Ind.) 60 N. E. 943; *Hissong v. Richmond & D. R. Co.*, 91 Ala. 514; *Louisville & N. R. Co. v. Baker*, 106 Ala. 624; *Alabama M. Ry. Co. v. McDonald*, 112 Ala. 216; *Louisville & N. R. Co. v. Morgan*, 114 Ala. 449; *Davis v. New York, N. H. & H. R. Co.*, 159 Mass. 532; *Nihill v. New York, N. H. & H. R. Co.*, 167 Mass. 52. Violently jerking back engine, *Highland Ave. & B. R. Co. v. Miller*, 120 Ala. 535; *Graham v. Boston & A. R. Co.*, 156 Mass. 4. Running too fast over defective track, *Alabama G. S. R. Co. v. Davis*, 119 Ala. 572. Permitting iron rake to fall from tender, *Culver v. Alabama M. Ry. Co.*, 108 Ala. 330. Disobedience of rule to approach switch slowly, *Louisville & N. R. Co. v. Mothershed*, 97 Ala. 261; *Coughlan v. City of Cambridge*, 166 Mass. 268. Failure to look for signal, *Fairman v. Boston & A. R. Co.*, 169 Mass. 170. Running over plaintiff, *Louisville & N. R. Co. v. Markee*, 103 Ala. 160; *McGhee v. Campbell* (C. C. A.) 101 Fed. 936. Turning steam on plaintiff, *Louisville & N. R. Co. v. Richardson*, 100 Ala. 232. Engineer disobeying city ordinance by running too fast, *Pittsburgh, C., C. & St. L. Ry. Co. v. Moore*, 152 Ind. 345; *Baltimore & O. S. W. Ry. Co. v. Peterson* (Ind.) 59 N. E. 1044. Rapid running not per se negligence, *Perdue v. Louisville & N. R. Co.*, 100 Ala. 535; *Louisville & N. R. Co. v. Woods*, 105 Ala. 561. Disobeying signal, *Richmond & D. R. Co. v. Farmer*, 97 Ala. 141.

as here used, does not include such vehicles moved on wheels as are not used on railways, though there are such vehicles which may properly be called cars. * * * We find nothing in the language of the statute to suggest that the word as there used was intended to convey a meaning which excludes the idea of a hand or lever car. * * * It is plain that subdivision 5 of the statute covers the case of an injury caused by reason of the negligence of a co-employee who has the charge or control of a car, though such car is at the time in no way connected with an engine and is not a part of a train. The negligent handling of a detached passenger or freight car may cause an injury which is actionable under the statute. It is not necessary that the car be connected in any way with a locomotive, or with other cars forming a train. If the car is adapted to the rails of a railroad, and is used in the business of railroads, we think that it is none the less within the meaning of the word, as used in the statute, because it is made to be propelled by hand."³⁴ Possibly an electric car might come within this definition.³⁵

A brakeman on a shunted car who fails to look out is within the act,³⁶ and the negligence of a man running a handcar, in checking its speed too suddenly, gives a cause of action.³⁷ "If one have charge or control of a car only for the purpose of bringing it to rest on a track,

³⁴ *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 421.

³⁵ *Louisville & N. R. Co. v. Anchors*, 114 Ala. 492. But see *Fallon v. West End St. Ry. Co.*, 171 Mass. 249.

³⁶ *Louisville & N. R. Co. v. Thornton*, 117 Ala. 274.

³⁷ *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412; *Jones v. Alabama Mineral R. Co.*, 107 Ala. 400; *Alabama Mineral R. Co. v. Jones*, 121 Ala. 113.

and he places it in a dangerous position thereon, and in consequence of its being there an injury afterwards results, this is actionable negligence within subsection 5. Such person must not only exercise due care in moving the car, but he is also under a duty to see that it is not placed and left in a dangerous position.”³⁸

§ 79. Train.

“Train” means either one or more cars, such as are used upon railways, either with or without a locomotive.

Save in the Alabama act, no mention is made of cars as distinct from a “train,” and the question at once arose whether one or more cars coupled together constituted a train, and whether a locomotive was essential. It was held in England that a locomotive was not necessary to a train. “A train is a train, whether consisting of trucks laden with goods or of carriages filled with passengers. The character of the load makes no difference. Nor do I think that a locomotive engine is essential to the making of a train.” In this case it was held that freight cars which were moved to the place where they were to be unloaded by means of a stationary engine constituted a train, within the act.³⁹ “The legislature meant that a locomotive engine by itself, or anything that was drawn along a railway, or was in course of being drawn along a railway by that locomotive engine, should be included in ‘a train.’ I doubt very much whether it would depend upon the number of carriages or the number of vehicles going upon

³⁸ *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 248; *Chicago & E. I. R. Co. v. Richards* (Ind. App.) 61 N. E. 18.

³⁹ *Cox v. Great Western Ry. Co.*, 9 Q. B. Div. 106, 109.

wheels which the locomotive was taking along the railway. I should think the legislature intended a very wide scope to be given to the use of these words."⁴⁰

In Massachusetts it is held that an engine and one or more cars constitute a train.⁴¹ "It is not easy to define what, under all circumstances, would constitute a train, within the meaning of the statute. A locomotive with one or more cars attached to it, with or without passengers or freight, in motion upon a railroad from one point to another by means of power furnished by the locomotive, would undoubtedly constitute a train.

* * * So it would if the steam was shut off from the locomotive, and the train was moving by its own momentum. Whether a single car under such circumstances would constitute a train, or whether a number of cars coupled together and at rest would constitute one, we need not now consider. The word 'train,' as used in the railroad act (Pub. St. c. 112), generally signifies cars in motion. Usually the power would be furnished by a locomotive. But whether a number of cars coupled together and in motion, and forming one connected whole, do or do not constitute a train, does not depend, we think, upon whether a locomotive engine is attached to them at the time and they are moved by the power thus supplied. The liability to accident, for which St. 1887, c. 270, was designed to furnish a remedy, would be the same in kind, though perhaps not so great in degree, whether the motive power was furnished by

⁴⁰ McCord v. Cammell & Co. [1896] App. Cas. 57, 64; Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412.

⁴¹ Dacey v. Old Colony R. Co., 153 Mass. 112; Shea v. New York, N. H. & H. R. Co., 173 Mass. 177.

a locomotive attached to the cars on in some other manner. And it seems to us that a number of cars coupled together as these were, forming one connected whole and moving from one point to another upon a railroad, in the ordinary course of its traffic, under an impetus imparted to them by a locomotive which shortly before the accident had been detached, constitute a train, within the meaning of St. 1887, c. 270, § 1, cl. 3."⁴² It is now settled by statute that one or more cars in motion, whether attached to an engine or not, shall constitute a train.⁴³

The charge or control of a train means the charge of it as a connected whole, and not of portions which, taken together, form the whole.⁴⁴ "It relates to the train or locomotive engine as a whole, and not to the individual parts which make up the train or engine. The statute might have been made to include those who have charge of the construction of the engine or the cars, or who inspect them. Neglect of their duties would be likely to cause an accident to the train while in motion. But the legislature in this part of the statute has gone no further than to include those whose duties relate to the charge of a locomotive engine or the train when complete." Thus, where a train broke apart because too

⁴² *Caron v. Boston & A. R. Co.*, 164 Mass. 523, 527; *Devine v. Boston & A. R. Co.*, 159 Mass. 348.

⁴³ Rev. Laws Mass. c. 106, § 1, cl. 3 (Acts 1897, c. 491, § 1): "One or more cars which are in motion, whether attached to an engine or not, shall constitute a train, within the meaning of clause 3 of this section."

⁴⁴ *Caron v. Boston & A. R. Co.*, 164 Mass. 523, 528; *Thyng v. Fitchburg R. Co.*, 156 Mass. 13. And see *McCord v. Cammell & Co.* [1896] App. Cas. 57, 65.

short a coupling pin was used, there was no remedy under the act.⁴⁵

“Ordinarily, one who is to determine whether the train is to move or remain stationary, and who is to give directions as to the moving or stopping of the train, may be said to be in the charge or control of it.”⁴⁶ He need not be on the train itself, or have any specified rank in the service. If one controls the movement of the train, not by giving directions, but by the application of physical force, as the engineer in managing his engine, or a brakeman applying brakes on shunted cars, he may be said to be in charge or control.

Examples of negligence of a person in charge or control of a train are collected below.⁴⁷

⁴⁵ *Thyng v. Fitchburg R. Co.*, 156 Mass. 13.

⁴⁶ *Steffe v. Old Colony R. Co.*, 156 Mass. 262. Thus, a conductor of a freight train has charge of it. *Davis v. New York, N. H. & H. R. Co.*, 159 Mass. 532; *Caron v. Boston & A. R. Co.*, 164 Mass. 523. Or the conductor of switching engine making up train. *Thyng v. Fitchburg R. Co.*, 156 Mass. 13. Possibly the foreman of a switching gang when the conductor is present. *Caron v. Boston & A. R. Co.*, 164 Mass. 523. See *supra*, § 74. And the conductor may be in charge, even though he is temporarily absent. *Donahoe v. Old Colony R. Co.*, 153 Mass. 356. An engineer may be in charge, *Davis v. New York, N. H. & H. R. Co.*, 159 Mass. 532; *McCord v. Cammell & Co.* [1896] App. Cas. 57. An engineer or fireman may be in charge of detached cars. *McCord v. Cammell & Co.* [1896] App. Cas. 57. A capstan man in control of a stationary engine may have charge of the train moved by it. *Cox v. Great Western Ry. Co.*, 9 Q. B. Div. 106. Compare *Whatley v. Zenida Coal Co.*, 122 Ala. 118. A brakeman may be in control. *Steffe v. Old Colony R. Co.*, 156 Mass. 262; *Caron v. Boston & A. R. Co.*, 164 Mass. 523; *Shea v. New York N. H. & H. R. Co.*, 173 Mass. 177. A station agent is not. *Fairman v. Boston & A. R. Co.*, 169 Mass. 170. Person in control of switch is not. *Fairman v. Boston & A. R. Co.*, 169 Mass. 170.

⁴⁷ Moving train without warning, *Cox v. Great Western Ry. Co.*, (348)

§ 80. Upon a railway.

"Upon a railway" means a steam railway or one originally operated as such.

This section of the act was passed to meet the dangers arising from steam railroads, and it was enacted at a time before electric railways had been adopted, or street railways had become a source of peculiar danger. The courts have confined all the words of this section, as well as those under discussion, to the kind of railroad the legislature must have had in mind.⁴⁸ It has been held in England that a tramway does not come within a statute relating to the taxation of railroads,⁴⁹ and in Alabama an electric railroad was considered within the intention of a statute applicable to steam railroads.⁵⁰ In Massachusetts it has been distinctly held that an electric car is not a "locomotive engine or train upon a railroad," though "possibly a railroad where the motive power has been changed in part or altogether from steam to electricity, or some other mechanical

9 Q. B. Div. 106; *Steffe v. Old Colony R. Co.*, 156 Mass. 262; *Davis v. New York, N. H. & H. R. Co.*, 159 Mass. 532. Failure to block cars. *McCord v. Cammell & Co.* [1896] App. Cas. 57. Shunting car with too great speed, or not applying brakes soon enough, *Devine v. Boston & A. R. Co.*, 159 Mass. 348; *Shea v. New York, N. H. & H. R. Co.*, 173 Mass. 177. Failing to order cars to stop, *Devine v. Boston & A. R. Co.*, 159 Mass. 348. Failure to warn brakeman of broken drawbar, *Donahoe v. Old Colony R. Co.*, 153 Mass. 356. Leaving car on side track too near main track, *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240; *Dacey v. Old Colony R. Co.*, 153 Mass. 112.

⁴⁸ *Thyng v. Fitchburg R. Co.*, 156 Mass. 13, 18; *Perry v. Old Colony R. Co.*, 164 Mass. 296; *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412; *Whatley v. Zenida Coal Co.*, 122 Ala. 118.

⁴⁹ *Swansea Improvements & Tramway Co. v. Swansea Urban Sanitary Authority* [1892] 1 Q. B. 357.

⁵⁰ *Louisville & N. R. Co. v. Anchors*, 114 Ala. 492.

agency, but which retains in other respects the characteristics of a steam railroad, would come within the purview of the act."⁵¹ The chief consideration would seem to be whether the railroad was of such a character that it gave rise to substantially the same dangers that are provided for in the act.

A dummy railroad⁵² comes within the act, as do also short and temporary tracks, over which engines and cars are run, built to aid in the construction of other works.⁵³ It is not necessary that the railroad should be owned by the defendant, if it is used and for the time being controlled by him.⁵⁴

A stationary engine which operates cars on a tramway⁵⁵ and a locomotive stalled in a roundhouse are not "upon a railroad."⁵⁶

Charge or control of the track.

The Alabama act contains the further provision that the employer shall be liable for the negligence of any person who has the charge or control "of any part of the track of a railway." A remedy is thus given for injuries received through the carelessness of section men and others who do not come within the definition of per-

⁵¹ *Fallon v. West End St. Ry. Co.*, 171 Mass. 249.

⁵² *Birmingham Ry. & E. Co. v. Baylor*, 101 Ala. 488.

⁵³ *Doughty v. Firbank*, 10 Q. B. Div. 358; *Coughlan v. City of Cambridge*, 166 Mass. 268.

⁵⁴ *Coughlin v. City of Cambridge*, 166 Mass. 268. See, also, *Spaulding v. Flynt Granite Co.*, 159 Mass. 587.

⁵⁵ *Whatley v. Zenida Coal Co.*, 122 Ala. 118. But the cars so moved are within the act. *Cox v. Great Western Ry. Co.*, 9 Q. B. Div. 106.

⁵⁶ *Perry v. Old Colony R. Co.*, 164 Mass. 296.

sons intrusted with the duty of seeing that the ways are in proper condition.

§ 81. Indiana clause.

The Indiana act includes persons in charge or control of any "telegraph office, switch yard, shop, roundhouse."

The Indiana clause omits the word "switch," and it was contended that the word "switch-yard" ought to be separated so as to cover persons in charge or control of both switches and yards, and that such a term as "switch yard" was unknown in the railroading business. The court held, however, that "the court may know from its general knowledge of the methods and appliances of railroad companies. * * * [The yard] consists of side tracks upon either side of the main tracks, and adjacent to some principal station or depot grounds, where cars are placed for deposit, and where arriving trains are separated and departing trains made up. It is the place where such switching is done as is essential to the proper placing of cars either for deposit or for departure.' * * * 'Railroad yard' and 'switch yard,' we have no doubt, are synonymous, and the latter term was used in the act under consideration as descriptive of the former."⁵⁷ There is consequently no liability under the act for the negligence of a person in charge or control of a switch.

This act also contains the following provision, which is not found in the other statutes: "Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, etc.,

⁵⁷ *Baltimore & O. S. Ry. Co. v. Little*, 149 Ind. 167, 173; *Charman v. Lake Erie & W. R. Co.*, 105 Fed. 449.

* * * or where such injury was caused by the negligence of any person, co-employee, or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employee, or fellow servant, at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.”⁵⁸ In a case which lately considered the effect of this fourth subdivision of the act it was said: “Appellant’s learned counsel construe the language of the statute above quoted as conveying the meaning that the right to recover against an employer for the negligence of a co-employee or fellow servant rests upon the condition that such negligent co-employee was at the time acting in the place and performing the duty that the master or employer owed to his or its servants or employees generally, and yet they do not say so in so many words. The majority of the court are of the opinion that the decision of that question is not necessary to the decision of this case. They hold that the only part of the fourth subdivision of said section which is necessary to be considered in determining the sufficiency of the complaint is the following: ‘Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any * * * locomotive engine or train upon a railway, * * * and the person so injured, obeying or conforming to the order of some supe-

⁵⁸ Burns’ Rev. St. Ind. 1894, § 7083, cl. 4.

rior at the time of such injury, having authority to direct;' and that hence it was not necessary that the complaint should state that the alleged negligent engineer, at the time he committed the alleged negligent injury, as provided in such concluding clause, was acting in the place and performing the duty of the corporation in that behalf,—while the writer hereof is of the opinion that the whole of the fourth subdivision must stand together, and that the words quoted from the concluding clause qualify the liability created in the first clause or clauses. But the duty of the corporation therein mentioned, in the opinion of the writer, means, not the duty it owes to its servants, but the duty it owes to the public in carrying on its business; and the words 'acting in the place of such corporation,' with the other words quoted, were used to convey the idea that, in order that the liability mentioned should exist, the negligent person, co-employee, or fellow servant must be acting as such employee in the line of his duty at the time of his negligence. The writer is of opinion that the complaint is good under this construction; and the holding of the court is that, in order to make the complaint good under the first part of the subdivision quoted, as to the point in question, it is only required that it state that the engineer, while in the service of appellant, in charge of a locomotive engine, negligently injured the appellee, both being at the time acting in the line of duty as employees of the appellant."⁵⁹

⁵⁹ Pittsburgh, C., C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 5. The last part of the above quotation, beginning "the holding of the court is," etc., has been affirmed. And it is also said that, "from the words used, and the structure and scope of the act, we are of opinion that the concluding clauses of the fourth subdivision

The meaning of the section is far from clear. The court apparently disregards the fact that the last half of the subdivision begins "or when such injury was caused by the negligence of any person, co-employee," etc., which would seem to show that a new ground of recovery is contained in this portion, and that it in no way qualifies the preceding clause. That clause is, with the omission of the word "control," substantially the same as that found in the other acts, where it is unqualified. The construction placed upon the section by the court has narrowed the effect of this clause considerably. It would seem reasonable to believe that the legislature, by following so closely the provisions of the earlier acts, intended to follow also the construction placed upon the several clauses, and then, in addition, give a remedy for a class of cases not included in the other provisions. That class of cases would seem to be those where a servant, while conforming to a proper order of his superior, is injured by the negligence of a fellow servant who is acting within the scope of his employment. Such a fellow servant would, under this construction of the clause, be one who was not intrusted with authority or with the performance of the master's personal duties or with the charge of any signal, etc., but a fellow servant simply. If the words "acting in the place and performing the duty of the corporation

limit and qualify only the liability expressed in the second part of the fourth subdivision, and that railroad companies are answerable for the negligence of their servants in charge of signals, telegraph offices, switch yards, shops, round houses, locomotive engines, and trains upon their railways, to their employees, the same as to strangers." *Indianapolis Union Ry. Co. v. Houlihan* (Ind.) 60 N. E. 943.

in that behalf" mean anything more than acting at the time as a servant of the railroad, they must mean that he is performing a delegated duty which the corporation is bound to the plaintiff to perform, and, if that were true, there would be no need of the clause, since the plaintiff would be protected at common law.

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CHAPTER VIII.

ASSUMPTION OF RISK.

- § 82. Generally.
- 83. Duty of Master.
- 84. Contributory Negligence.
- 85. *Volenti non Fit Injuria*.
- 86. Distinction between *Volenti non Fit Injuria* and Contributory Negligence.
- 87. Pleading Assumption of Risk.
- 88. Contractual Assumption.
- 89. Fellow Servants.
- 90. Dangers Incidental to the Business.
- 91. Transitory Risks.
- 92. Dangers Arising from the Condition of Affairs.
- 93. Dangers Known to Servant.
- 94. Reasonable Care to Discover Dangers.
- 95. Obvious Dangers.
- 96. Dangers Obvious to Minors.
- 97. Extent of Knowledge.
- 98. Presumptions as to Knowledge.
- 99. Duty to Warn.
- 100. When Place or Machinery is not Furnished by Master.
- 101. Contractual Assumption of Risk Applies Only to Servants.

§ 82. Generally.

Assumption of risk as applied in master and servant cases is a convenient rule for determining the question of liability when the agreement or conduct of the plaintiff disentitles him to recover, without considering whether or not the defendant may have been negligent.

It includes not only defenses peculiar to the relation of master and servant, but, as generally used, covers also defenses available between strangers.

When recovery for personal injuries is denied a serv-
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ant because he "assumed the risk," the court finds from the agreement or the conduct of the plaintiff that he has disentitled himself to compensation, and therefore does not find it necessary to consider whether or not the master has been guilty of negligence towards him. Assumption of risk is thus a short cut to the decision of liability based upon the agreement or conduct of one of the parties. The courts are not consistent with themselves or with each other in applying this doctrine, as a matter of law, to the cases presented, and the confusion arises from the loose use of the expression "assumption of risk," and a failure to distinguish the exact ground which prevents recovery.¹

The basis of every action for personal injuries, suffered by a stranger or by a servant, is negligence, and to make out his case the plaintiff must show a duty owed him by the defendant, a failure to use due care in fulfilling it, and thereby loss proximately resulting to him. To this claim the defendant has two lines of defense:

First, he may deny the negligence (a) because he did use due care, or (b) because he owed no duty whatever to the plaintiff to use care.²

Second, he may admit the negligence, but deny that it was a proximate or legal cause of the injury, (a) because of the intervening act of a third agency or of the plaintiff himself, or (b) because the plaintiff had consented to take the risk of injury from it. In (a)

¹ A learned judge has expressed the "hope that this fashionable, modern doctrine will not lead to a departure from the sound principles on which the law of negligence rests." *Davis v. Forbes*, 171 Mass. 548.

² See *infra*, § 83.

the plaintiff is guilty of contributory negligence;³ in (b) the principle expressed in the maxim, *Volenti non fit injuria*, bars his recovery.⁴ In other words, the defendant may in the first case deny the right of action, or, in the second, deny his accountability for the consequences.⁵

None of these allegations or defenses are peculiar to actions by a servant against his master save that found in the first class, (b), which relates to the defendant's duty. The courts have, however, used the term "assumption of risk" to cover cases not only included in the defense of absence of duty (I b, above noted), but also to cover the defenses of contributory negligence and *volenti non fit injuria* (II, a and b). There is nothing necessarily inaccurate in such a use of the term, but it leads to confusion, and it would be of greater value were it confined to the disabilities imposed by the relation of master and servant,⁶ and, when other considerations prevent recovery, that they be called by their right names,—contributory negligence and *volenti non fit injuria*. The distinction becomes important when, as is usually the case, the defendant seeks to have the court rule as a matter of law upon the plaintiff's right to recover. Inasmuch as the assumption of risks between master and servant depends upon duties raised by a supposed agreement or by implication of law from the relationship, the construction of them is primarily a

³ See *infra*, § 84.

⁴ See *infra*, §§ 85, 86.

⁵ As to pleading, see *infra*, § 87, and c. 10.

⁶ It has been called "contractual assumption of risk" in Massachusetts. *Infra*, §§ 88, 101. Possibly "servant's disabilities" may more accurately describe it.

matter of law for the court, and the case goes to the jury only when the evidence, reasonably establishing a duty, raises the question of its due performance. On the other hand, when the question is whether the plaintiff was himself negligent or assented to the wrong, the mutual duties, being generally admitted rather than in issue, the question is entirely one of conduct and inferences to be drawn from it, and thus is a fact primarily to be determined by the jury, and the court can pass upon it only when the evidence conclusively establishes the defense.⁷ The attempt will be made to keep the distinction in mind in this and the succeeding chapter, and accordingly the present chapter is devoted to the disabilities springing from the relationship,⁸ and the next chapter to such conduct on the plaintiff's part as prevents his insisting upon the performance of duties secured to him.

The contract of service.

When a person engages to work for another, both a contract and a *status* are created. The contract may be either express, or implied from the understanding of the parties, and it determines the character of the services to be rendered, the wages to be paid, and the duration of the hiring. This, like any other contract, requires mutual assent and consideration, and a breach of it gives an action *ex contractu*.⁹ Thus, the servant may refuse to perform the stipulated work, or the master may fail to give him work or require him to perform

⁷ *Infra*, § 118.

⁸ *Infra*, § 88 et seq.

⁹ Wood, Master & Servant, § 4.

services outside the agreement, and an action will lie for the breach. Unless the contract expressly defines the period, its duration is left to implication. In England a general hiring is construed to be a hiring for the space of a year; but this rule does not hold in the United States, and, unless the period of payment furnishes an inference, a general hiring is construed to be for no definite time, but to permit a determination at the will of either party.¹⁰ The continuance of the contract is in all cases a question of fact, in the absence of

¹⁰ "If the payment of monthly or weekly wages is the only circumstance from which the duration of the contract is to be inferred, it will be taken to be a hiring for a month or a week." *Beach v. Mullen*, 34 N. J. Law, 343; *Great Northern Hotel Co. v. Leopold*, 72 Ill. App. 108; *Jones v. Trinity Parish*, 19 Fed. 59. See, also, *Tennessee C., I. & R. Co. v. Pierce* (C. C. A.) 81 Fed. 814; *Milner v. Hill*, 19 Ohio Cir. Ct. R. 663.

A general hiring is *prima facie* a hiring at will. "A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. * * * Thus it will be seen that the fact that the compensation is measured at so much a day, month, or year does not necessarily make such hiring a hiring for a day, month, or year, but that in all such cases the contract may be put an end to by either party at any time, unless the time is fixed, and a recovery had at the rate fixed for the services actually rendered." *Martin v. New York Life Ins. Co.*, 148 N. Y. 117, 121; *Copp v. Colorado C. & I. Co.*, 29 Misc. Rep. (N. Y.) 702; *Mason v. Secor*, 76 Hun (N. Y.) 178; *Speeder Cycle Co. v. Teeter*, 18 Ind. App. 474; *Kansas Pacific Ry. Co. v. Roberson*, 3 Colo. 142. See, also, *Grisham v. Lee*, 61 Kan. 533; *Lawless v. Meynier* (C. C. A.) 60 Fed. 445; *Booth v. National India Rubber Co.*, 19 R. I. 696; *Littler v. Smiley*, 9 Ind. 116; *Taggart v. Tevanny*, 1 Ind. App. 339. As to regulations requiring servants to give notice of an intention to leave, see *Hunt v. Otis Co.*, 4 Metc. (Mass.) 464; *Collins v. New England Iron Co.*, 115 Mass. 23; *Naylor v. Fall River Iron Works Co.*, 118 Mass. 317; *Preston v. American Linen Co.*, 119 Mass. 400.

express agreement, and may depend upon the occurrence of the pay day or upon the nature of the services to be performed.¹¹ When the contract expires by its own limitation, continuance in employment is construed as a renewal of the engagement upon the same terms; and if, by act of one of the parties, the contract is broken during its continuance, a right of action arises upon which such a sum may be recovered as will reimburse the party for the loss of his chance to carry out the agreement.¹²

Although the contract of hiring depends upon the same principles as other contracts, yet it has one peculiarity, in that it creates a *status* or relationship between the parties to which the policy of the law has affixed certain rights, duties, and disabilities to be observed by each, irrespective of any understanding or supposed agreement between them. These duties and disabilities arise when the relation is created, and continue until it ends, and for the most part are determined by the condition of affairs when the contract of hiring is made. It is usual and convenient to treat them as terms of an implied contract;¹³ but it is a contract implied from the relationship, and not from the agreement of the parties, and has none of the incidents of a technical contract. Consideration is unnecessary, for a volunteer is placed in

¹¹ It is a question of fact. *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56; *Krieger v. Kaye*, 60 N. Y. Supp. 992.

¹² *Paige v. Barrett*, 151 Mass. 67. See *Huntington v. Ogdensburgh & L. C. R. Co.*, 7 Am. Law Reg. (N. S.) 143; *Board Com'rs Allen Co.*, 25 Am. Law Reg. (N. S.) 521.

¹³ *Farwell v. Boston & W. R. Co.*, 4 Metc. (Mass.) 49; *supra*, § 1; *infra*, § 88.

the same position as one actually hired,¹⁴ and capacity to contract is not regarded, for an infant, though able to make only a voidable contract, assumes all the disabilities imposed on an adult.¹⁵ Mutual assent is not necessary, for a servant assumes the risks of a fellow servant's negligence,¹⁶ or of dangers incidental to the business,¹⁷ irrespective of his knowledge; and also the risks from obvious dangers existing when he entered the employment, which, although he knew them, he may in fact have objected to undertake.¹⁸ Moreover, a breach of the duty gives an action *ex delicto*, and arises only when there has been both a failure to use care and personal injury thereby resulting. The damages are not for loss of a contract, but for injuries suffered through negligence.¹⁹

¹⁴ Swainson v. Northeastern Ry. Co., 3 Exch. Div. 341; Barstow v. Old Colony R. Co., 143 Mass. 535. And so in the case of a substitute hired by the servant (Anderson v. Guineau, 9 Wash. 304), or one called upon for work out of his employment by another servant (Stevens v. Chamberlin [C. C. A.] 100 Fed. 378). *Infra*, § 8.

¹⁵ Contract of hiring not enforceable where legal disability exists. Wood, Master & Servant, §§ 5, 6, 8; Gaffney v. Hayden, 110 Mass. 137. But he is a servant so far as imposing liability on his master for his acts. Wood, Master & Servant, *supra*. And he assumes the risks of the employment. *Infra*, § 96.

¹⁶ *Infra*, § 89.

¹⁷ *Infra*, § 90.

¹⁸ *Infra*, §§ 83, 88, 92.

¹⁹ "Such rights and duties are not properly contractual, nor is their breach a contractual wrong. * * * In the case of master and servant, this is even more marked. The contract of employment, generally informal, incomplete, oral, and containing no more than an agreement of wages, work, and time of payment, entails liability and secures rights or superimposes duties implied by law, with respect to the relation, unknown to the parties, and in a large measure to lawyers, and as to most material matters, in a number of instances, to the courts, prior to the decision of the case in issue. Thus (362)

The master and servant law is a construction of these duties and disabilities, and it is generally unnecessary to consider the rights which are created by the contract of hiring. However, in a few cases it is believed that this distinction should be observed, especially where continuance at work in the face of a known danger,²⁰ or the breach of a statutory obligation,²¹ is involved.

§ 83. Duty of master.

A person suffering an injury may recover damages only when the loss is caused by a breach of duty owed to him. And thus a servant assumes all risks, however arising, save those against which the master is bound by virtue of the relation existing between them to protect him.

"In order to maintain an action for injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault or negligence or breach of duty where there is no act or service or contract which a party is bound to perform or fulfill. * * * Negligence consists in doing or omit-

it will be seen that the courts implied into the contract the doctrine of assumption of risks of the employment by the servant, and especially the risk of the negligence of a fellow servant. Nevertheless it is the contract, without which the relationship could not exist, which brings these rights into existence; and the rights and duties vary with the contracts. * * * There is a body of law outside of the agreement of the parties prescribing rights and defining duties not directly contemplated by the parties, but a breach of which is actionable as a tort." Jaggard, *Torts*, p. 23; *Ames v. Union Ry. Co.*, 117 Mass. 541.

²⁰ *Infra*, §§ 107, 114.

²¹ *Infra*, § 116.

ting to do an act by which a legal duty or obligation has been violated."²²

As members of the community, merely, each must so manage his affairs, whether by himself or by his agents, as not to injure another,²³ and use reasonable care to protect himself from another's negligence.²⁴ These duties are imposed upon all under all conditions; but when the plaintiff and defendant single themselves out of the crowd, and come into contact with each other, lesser or greater duties may be imposed upon them, springing from some privity of contract or relationship between them.

"A trespasser who comes on the land of another without right cannot maintain an action if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrongdoers. So, a licensee who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure."²⁵

²² *Sweeny v. Old Colony & N. R. Co.*, 10 Allen (Mass.) 368, 371; *Brazil Block Coal Co. v. Young*, 117 Ind. 520; *Dean v. Roaring Fork E. L. & P. Co.*, 5 Colo. App. 521.

²³ *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49; *Stewart v. Harvard College*, 12 Allen (Mass.) 58.

²⁴ *Butterfield v. Forrester*, 11 East, 60; *White v. Winnisimmet Co.*, 7 Cush. (Mass.) 155, 161.

²⁵ *Sweeny v. Old Colony & N. R. Co.*, 10 Allen (Mass.) 368, 371; (364)

When, however, the plaintiff comes to the defendant's premises, not solely for his own convenience or pleasure, but in response to some inducement offered him, a duty as to their condition is imposed upon the occupier. "The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of."²⁶ The act of the defendant in causing or inducing the plaintiff to come to his premises imposes the duty upon him, and the plaintiff must show that he was there by the invitation of the defendant, and not by mere license or permission. "The fact that the plaintiff was induced to enter upon a dangerous place without warning is the negligence which entitles the plaintiff to recover."²⁷

"It is well settled that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he per-

Reardon v. Thompson, 149 Mass. 267; Plummer v. Dill, 156 Mass. 426; Shea v. Gurney, 163 Mass. 184, 188; Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221; Hounsell v. Smyth, 7 C. B. (N. S.) 731; Bolch v. Smith, 7 Hurl. & N. 736.

²⁶ Carleton v. Franconia I. & S. Co., 99 Mass. 216, 217; Brosnan v. Sweetzer, 127 Ind. 1; Howe v. Olemart, 7 Ind. App. 32; Indermaur v. Dames, L. R. 1 C. P. 274, L. R. 2 C. P. 311; Winch v. Conservators of the Thames, L. R. 9 C. P. 378; Woodley v. Metropolitan Ry. Co., 46 Law J. Exch. (N. S.) 521; Memberv v. Great Western Ry. Co., 14 App. Cas. 179.

²⁷ Davis v. Central Congregational Soc., 129 Mass. 367, 371.

mits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant."²⁸

The duty imposed upon an occupier of premises has been well stated. "The common law imposes on the occupier of premises no abstract obligation at all, as to the state in which he is to keep them, provided that he carries on no unlawful business and is guilty of no nuisance. In the case of premises that contain an element of danger, a duty arises as soon as there is a possibility that people will go upon them; but it is a duty only towards such people as actually do go. It is not a duty in the air, but a duty towards particular people. The occupier is bound to use all reasonable care to prevent such persons from being hurt. It is obvious that this duty must vary according to the character of the danger and the circumstances under which the premises are to be visited. It differs in the case of hidden dangers and the case of dangers that are palpable and visible. It may vary according to the age and comprehension of the visitor; in the case of bare licensees, and of those who come on the premises on the occupier's business and at his invitation. The only obligation on the occupier is to take such precautions as are reasonable in each instance to prevent mischief; and this is but the adaptation to a special case of the general doctrine, *Sic utere tuo ut alienum non laedas*."²⁹

²⁸ *Plummer v. Dill*, 156 Mass. 426, 427; *The Thomas Turnbull*, 99 Fed. 781 (person applying for work).

²⁹ *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 695.

The invitation extends only to the particular business to be transacted and to those places and things only which are reasonably included in the invitation. The occupier is not bound to have all places safe, but only those where the plaintiff is expected to go, and if the latter goes elsewhere he does so at his own risk.³⁰

While the invitation lasts, the occupier continues under the same obligations.

In addition to the special duty imposed upon him as occupier of premises, the defendant is under the general and continuing duty of refraining from injuring the plaintiff through the carelessness of himself or his agents.

Such are the duties between persons standing in no other relation than that of occupier of premises and one invited upon them. A servant comes within the strict definition of invited person. An employer of labor holds out inducements for men to work for him, and, when the invitation is accepted, the servant is entitled to the rights of one invited to the premises; he is entitled to warning of all dangers which the employer knows and he does not.³¹ "It is well settled that a servant assumes the obvious risks of the service into which he enters, even if the business be ever so dangerous, and if it might easily be conducted more safely by the em-

³⁰ *Gilbert v. Nagle*, 118 Mass. 278; *Petterson v. Hemenway*, 148 Mass. 94; *June v. Boston & A. R. Co.*, 153 Mass. 79; *Walker v. Winstanley*, 155 Mass. 301; *Gibbons v. British & N. A. S. N. Co.*, 175 Mass. 212; *Sloss I. & S. Co. v. Knowles (Ala.)* 30 South. 584. See *Hanlon v. Thompson*, 167 Mass. 190; *infra*, § 104.

³¹ *Woodley v. Metropolitan Ry. Co.*, 46 Law J. Exch. (N. S.) 521; *Thomas v. Quartermaine*, 18 Q. B. Div. 685; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Garnett v. Phoenix Bridge Co.*, 98 Fed. 192; *infra*, §§ 88, 92.

ployer. This is implied in his voluntary undertaking, and it comes within a principle which has a much broader general application, and which is expressed in the maxim, *Volenti non fit injuria*. The reason on which it is founded is that, whatever may be the master's general duty to conduct his business safely in reference to persons who may be affected by it, he owes no legal duty in that respect to one who contracts to work in the business as it is."³²

A servant, like any other invited person, is asked by the master to such places only and to such machinery as are reasonably required for the work he is hired to do. The extent of the invitation is the scope of his employment. If the servant, of his own motion, goes outside this scope of employment, he is at best but a licensee, taking the risk of the dangers he meets, whether he knows of them or not, and the master owes him no duty to warn or protect him against them. But if the servant is sent by the master on either a temporary or a permanent service beyond the scope of the duties he was hired to perform, he then goes at the master's invitation, and is entitled to such rights and is subject to such disabilities as belong to one in that position, whether servant or not.³³

So far the servant is treated the same as other persons invited to the defendant's premises, but here the likeness stops. A stranger asked to the premises may recover for the negligence of the master's servants in the scope of their employment, but the servant, by be-

³² *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 157; *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135. *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 695; *infra*, § 85.

³³ *Infra*, §§ 102-106.

coming such, has identified himself with the business there conducted, and become a part of it, and the policy of the law has deemed it fair that the benefit of the maxim, *Respondeat superior*, should be denied him, and the master should owe him no duty in regard to the negligence of fellow servants³⁴ or in regard to the natural and ordinary dangers of the business he has entered.³⁵ These disabilities are peculiar to him in his *status* of servant. In most jurisdictions the scope of the servant's employment has no bearing on the master's exemption from liability for the negligence of a fellow servant, and that all employed in the common service, save such as perform the master's duties, are fellow servants with the plaintiff, whether he comes in contact with them or not in the ordinary course of his work.³⁶

So long as the servant continues in the employment he has these rights belonging to him in his position of invited person and these disabilities arising from his position as servant. The relationship, however, imposes other duties on the master, which likewise continue during the term of service. He is bound to use reasonable care to hire and retain competent servants, provide and maintain safe and proper places, machinery, appliances, and materials for the work required, to conduct his business in a proper manner, and to warn his servant of dangers which he knows arising during the employment.³⁷ These duties, also, are limited and defined by the scope of the plaintiff's employment.³⁸

³⁴ *Supra*, §§ 1, 55; *infra*, § 89.

³⁵ *Infra*, §§ 90, 91.

³⁶ *Supra*, §§ 1, 55.

³⁷ *Supra*, §§ 1, 2, 37, 55; *infra*, §§ 89, 99.

³⁸ *Infra*, §§ 102-105.

All these duties which a master owes, as occupier of premises and as master, are ordinarily phrased as terms in an implied contract, although certain of the duties arise when there is no contract whatever, and others are imposed by the policy of the law upon one who becomes a servant. The risks which are covered by this contract of service at the time it is made, and the duties which are then imposed, are conveniently called the "contractual assumption of risks," and it is to these that the phrase "assumption of risks" should be confined.³⁹

The risks which are assumed by this contract, and all other risks, from whatever cause arising, may be loosely said to be assumed by a servant. Where the defendant owes no duty, whether the duty never existed or has been waived, he cannot be held guilty of negligence, and thus the plaintiff runs the risk of injury from all causes for which the defendant is not legally responsible. "There is necessarily a range of action within which he is expected, so far as the defendant is concerned, to look out for himself. Then, if the accident happened within this range, it matters not whether it happened from an entirely outside cause or from an error in the plaintiff's judgment, which any man of sound sense might make, or from an error that most persons would condemn as careless. All this is immaterial. As far as the defendant was concerned, the plaintiff ought to have looked out for himself when he got hurt, and this clears the defendant. And the question whether the plaintiff's conduct was wise or foolish, reasonable or unreasonable, or what outside ele-

³⁹ *Supra*, § 82; *infra*, § 88.

ments he relied on for protection, is simply an outside matter."⁴⁰

§ 84. Contributory negligence.

The term "assumption of risk" may include contributory negligence.

Although the master may have been negligent, yet carelessness on the part of the servant may be the proximate cause of the injury and prevent his recovery.

When the defendant, owing a duty to the plaintiff, has failed to exercise reasonable care to perform it, whereby an injury results, he may nevertheless escape liability if it appears that the plaintiff has also been guilty of negligence which contributed to the result. "If the plaintiff or party injured, by the exercise of ordinary care under the circumstances, might have avoided the consequences of the defendant's negligence, but did not, the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant, nor will it attempt any apportionment thereof."⁴¹

The defendant is responsible for injuries which are the proximate result of his default, and "the defense of contributory negligence is only an amplified form of denial that the injury was caused by the negligence of defendant."⁴² The person who must bear the loss,

⁴⁰ Hay, *Law of Railway Accidents*, p. 37; *Robb v. Bullock*, 19 *Ret. Ct. Sess. Cas.* (4th Ser.) 971. See *Jones v. Granite Mills*, 126 *Mass.* 84; *Girard v. Griswold*, 177 *Mass.* 57 (escape from fire); *Craven v. Mayers*, 165 *Mass.* 271.

⁴¹ *Cooley*, *Torts*, p. 674; *Butterfield v. Forrester*, 11 *East*, 60; *Montgomery Gas-Light Co. v. Montgomery & E. Ry. Co.*, 86 *Ala.* 372; *City of Indianapolis v. Cook*, 99 *Ind.* 11; *Murphy v. Deane*, 101 *Mass.* 455; *Colorado Central R. Co. v. Holmes*, 5 *Colo.* 197.

⁴² *McEvoy v. Waterford S. S. Co.*, L. R. 18 *Ir.* 159, 165; *Murphy v.*

whether it be the plaintiff or the defendant, is he who could last have avoided the injury by the exercise of reasonable care. Thus, "though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."⁴³

The several states are not agreed upon the question whether the plaintiff has the burden of proving his own due care, or the burden of proving contributory negligence rests upon the defendant. All jurisdictions recognize that the defense of contributory negligence is a denial that the defendant's fault was the proximate cause of the injury, and the difference between them arises in part from a difference of view in regard to burden of proof, and in part to the application of a presumption of fact that a person is to be presumed careful until the contrary appears. In Massachusetts it is said that "the burden of proof never shifts"; that upon all the pleadings and the evidence the plaintiff, at the end of the trial, must establish his case by a preponderance of the evidence, and that affirmative pleas or presumptions of fact only change for the time being the

Deane, 101 Mass. 455; *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 697.

⁴³ *Radley v. London & N. W. Ry. Co.*, 1 App. Cas. 754, 759; *Davey v. London & S. W. Ry. Co.*, 12 Q. B. Div. 71; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408. In admiralty, where both parties are at fault, "the mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery," and damages may be divided. *The Max Mor* (372)

duty of going forward with evidence.⁴⁴ Elsewhere the words "burden of proof" are generally used to mean not only the final *onus* on a plaintiff to establish his case, but also the *onus* temporarily resting upon a party, whether plaintiff or defendant, to go forward with evidence; and this latter *onus* shifts from one side to the other as the trial progresses.⁴⁵ Either use of the term is correct when the sense in which it is employed is clear.⁴⁶

As contributory negligence shows that the defendant's fault is not the proximate cause of the injury, then, as the plaintiff has the burden of establishing his right

ris, 137 U. S. 1; *Olson v. Flavel*, 34 Fed. 477. See, also, *Central of Georgia Ry. Co. v. Lamb*, 124 Ala. 172.

⁴⁴ *Central Bridge Corp. v. Butler*, 2 Gray (Mass.) 130; *Willett v. Rich*, 142 Mass. 356. See *Wahl v. Shoulders*, 14 Ind. App. 665.

⁴⁵ "In order to make my opinion clear, I should like to say shortly how I understand the term 'burden of proof.' In every lawsuit, somebody must go on with it. The plaintiff is the first to begin, and, if he does nothing, he fails. If he makes a *prima facie* case, and nothing is done by the other side to answer it, the defendant fails. The test, therefore, as to burden of proof, is simply to consider which party would be successful if no evidence at all was given, or if no more evidence was given than is given at this particular point of the case, because it is obvious that during the controversy in the litigation there are points at which the *onus* of proof shifts, and at which, if the case stopped there, it must be decided in a particular way. Such being the test, it is not a burden which rests forever on the person on whom it is first cast, but as soon as he, in his turn, finds evidence which, *prima facie*, rebuts the evidence against which he is contending, the burden shifts until again there is evidence which satisfies the demand. Now, that being so, the question as to *onus* of proof is only a rule for deciding on whom the obligation rests of going further if he wishes to win." *Abrath v. Northeastern Ry. Co.*, 32 Wkly. Rep. 50, 53, 11 Q. B. Div. 440; *Western Ry. v. Williamson*, 114 Ala. 131.

⁴⁶ J. B. Thayer, *Burden of Proof*, 4 Harv. Law Rev. 45.

to recover against the defendant by a preponderance of all the evidence, he has the final duty of maintaining the proposition that he was free from fault. But this does not mean that he should necessarily bear the *onus* of going forward with evidence upon the subject, and, when it is said that the defendant has the burden of proving contributory negligence, it means that he must first offer the evidence, not that, when all the evidence is in, the burden of establishing the issue rests on him.⁴⁷

“Burden of proof,” as it is used in this connection, refers only to the party who ought to allege contributory negligence and first offer evidence in regard to it. As to this there are two views, depending, it is sometimes said, upon the existence of a presumption of fact that a person is assumed to be careful until the contrary appears. In jurisdictions where such a presumption is recognized, the plaintiff makes out a *prima facie* case by alleging and offering evidence as to the defendant’s fault; and it is unnecessary to allege or offer evidence as to his own care, since this is presumed unless the defendant chooses to attack it. “The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of the defendant’s conduct would create so strong a probability that the injury happened through his fault that no other evidence would be required. * * * The culpability of the defendant must be affirmatively proved before the case can go to the jury, but the absence of any fault on the part of the plaintiff may be inferred from circumstances; and the disposition of men to take care of themselves and keep out of danger

⁴⁷ Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291.

may properly be taken into consideration.”⁴⁸ The other view denies the existence of any presumption of care dispensing with the necessity for evidence upon the subject, and as part of the plaintiff’s case he must allege and prove that he was free from fault contributing to the injury. “The mere proof that the negligence of the defendant was a cause adequate to have produced the injury will not enable a plaintiff to recover, as it does not necessarily give rise to the inference of due care upon his part, proof of which is essential to his case. It may still be that he was not exercising it, and the injury thus have resulted from the concurring negligence of both parties.”⁴⁹

The distinction becomes of importance when the court is asked to direct a verdict for the defendant. Thus, when there is no evidence whatever on the question of

⁴⁸ *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 401, 407. In England, the federal courts, Alabama, and Colorado, contributory negligence must be shown first by the defense. *Bridge v. Grand Junction Ry. Co.*, 3 Mees. & W. 244; *Martin v. Great Northern Ry. Co.*, 16 C. B. 179; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291; *Hough v. Railway Co.*, 100 U. S. 213; *Smoot v. City of Wetumpka*, 24 Ala. 112; *Bromley v. Birmingham M. R. Co.*, 95 Ala. 397; *Western Ry. Co. v. Williamson*, 114 Ala. 131; *Union Pac. Ry. Co. v. Tracy*, 19 Colo. 331; *City of Denver v. Dunsmore*, 7 Colo. 328. In Alabama, evidence of contributory negligence is not admissible under the general issue (*Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412), but it is not essential generally that it be specially pleaded (*Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291). See *infra*, § 127.

⁴⁹ *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257. In Massachusetts and formerly in Indiana the plaintiff must allege and prove his due care. *Lane v. Crombie*, 12 Pick. (Mass.) 177; *Mayo v. Boston & M. R. R.*, 104 Mass. 137; *Pierce v. Oliver*, 18 Ind. App. 87; *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102; *Jeffersonville, M. & I. R. Co. v. Lyon*, 55 Ind. 477; *Cincinnati, H. & I. R. Co. v. Butler*, 103 Ind. 31. See *Burns’ Rev. St. Ind.* 1901, § 359a.

the plaintiff's care, he is entitled to recover in those jurisdictions where the burden of introducing such evidence rests in the first instance upon the defendant;⁵⁰ but he cannot recover in Massachusetts or Indiana, since in these states it must in some way appear from the plaintiff's evidence that he exercised care. But in these latter jurisdictions direct affirmative evidence of the plaintiff's care is not required, and his due care may, upon all the circumstances, be inferred from absence of fault.⁵¹

The rules applying to contributory negligence at common law are not affected by the passage of the employers' liability act, and, as this defense merges in many instances with the defense of *volenti non fit injuria*, it is seldom advantageous to distinguish them.⁵²

The phrase "assumption of risk," in so far as it means that the injury was caused by the fault of the plaintiff, is often used in cases where the ground upon which recovery is denied is strictly that of contributory negligence, and it is intended here only to call attention to a few principles applicable to the defense not raised in cases cited under subsequent topics.

Care of children and defective persons.

Children are bound to exercise such care as their capacity warrants. "It was necessary that the plain-

⁵⁰ Bromley v. Birmingham M. R. Co., 95 Ala. 397.

⁵¹ Mayo v. Boston & M. R. R., 104 Mass. 137; *infra*, § 118.

⁵² Due care under act, *infra*, § 117; care to discover danger upon entrance into the employment, *infra*, §§ 94, 112; care to avoid incidental dangers, *infra*, § 91; beyond scope of employment, *infra*, § 104; when sent out of scope, *infra*, § 105; use of machinery, etc., *infra*, § 108; disobedience of rules, *infra*, § 109; continuance at work in face of danger, *infra*, § 114.

tiff, though a boy, should prove that he was in the exercise of due care. But due care on his part did not require the judgment and thoughtfulness which would be expected of an adult under the same circumstances. It is that degree of care which could reasonably be expected from a boy of his age and capacity. If the court had ruled that, if the plaintiff was old enough to know that striking the dog would be likely to incite him to bite, he could not recover, it would have been erroneous. This is not the true test. It entirely disregards the thoughtlessness and heedlessness natural to boyhood. The plaintiff may have been old enough to know, if he stopped to reflect, that striking a dog would be likely to provoke him to bite, and yet, in striking him, he may have been acting as a boy of his age would ordinarily act under the same circumstances. The age of the plaintiff was an important fact for the consideration of the jury; but the court correctly held that the true rule was that he was entitled to recover if he was in the exercise of that degree of care which, under like circumstances, would reasonably be expected of a boy of his years and capacity.”⁵³

The blindness, deafness, or great age of the plaintiff is a circumstance to be considered by the jury upon the question of his due care. He must use such care as persons afflicted with this incapacity would ordinarily use.⁵⁴ Intoxication is not in itself negligence;

⁵³ *Plumley v. Birge*, 124 Mass. 57; *Pierce v. Connors*, 20 Colo. 178; *Louisville, N. A. & C. Ry. Co. v. Rush*, 127 Ind. 545; *Indianapolis, D. & W. Ry. Co. v. Wilson*, 134 Ind. 95; *Keller v. Gaskill*, 9 Ind. App. 670; *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657. See, *infra*, § 96.

⁵⁴ *Shapleigh v. Wyman*, 134 Mass. 118; *Smith v. Wildes*, 143 Mass. 556; *Town of Salem v. Goller*, 76 Ind. 291.

but, if it contributes in any degree to the injury, the plaintiff cannot recover.⁵⁵

§ 85. *Volenti non fit injuria.*

The phrase "assumption of risk" includes "*volenti non fit injuria.*" If a person knows and appreciates a danger created by the default of another, and voluntarily consents to encounter it, he cannot hold the latter responsible for injuries received.

The principle expressed in the maxim, *Volenti non fit injuria*,—"That to which a person assents is not esteemed in law an injury,"⁵⁶—is one of general application in the law, not confined to actions for negligence, nor to cases involving the rights of masters and servants.⁵⁷

⁵⁵ *Holland v. West End St. Ry. Co.*, 155 Mass. 387; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53; *Woods v. Board Com'rs Tipton Co.*, 128 Ind. 289. See, also, *Johnson v. Louisville & N. R. Co.*, 104 Ala. 241.

⁵⁶ *Grendon v. Bishop of Lincoln*, Plowd. 501; *Wingate*, Max. 482; *Broom*, Leg. Max. *268; *Wharton*, Leg. Max. p. 213.

⁵⁷ Husband's consent to his wife's adultery, or his condonation of it; seduction; money voluntarily paid and sought to be recovered on ground that it is not due, where the statute of limitations or infancy was a bar to its collection,—are examples. See note 56.

"The doctrine applicable to voluntary payments of money not recoverable by law grows out of this rule of law, and the rules governing in cases of contributory negligence of the injured party is nearly allied to, if not an outgrowth of, the maxim." *Eckert v. Long Island R. Co.*, 43 N. Y. 502, 507. Consent to sale of property on execution, *Lyon v. Tallmadge*, 1 Johns. Ch. (N. Y.) 185. It does not apply where money is paid with knowledge, but under protest. *Broom*, Leg. Max. *268. Nor in equity to a usurious loan. 1 Story, Eq. Jur. § 302. It has no place in the criminal law. *Reg. v. Longbottom*, 3 Cox, C. C. 439. Voluntarily engaging in a prize fight does not bar either a criminal or a private action. *Reg. v. Coney*, 8 Q. B.

The courts agree in the statement of the rule: "One who has invited or consented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong;"⁵⁸ or, in another form: "One who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure."⁵⁹ The elements necessary for the application of the maxim are not in doubt. There must be a duty owed by the defendant to the plaintiff, knowledge and appreciation by the plaintiff of danger to him from its breach, and a willingness to accept that risk without looking to the defendant for compensation if injury results.

There must obviously be some duty owing to the plaintiff from the defendant, a breach of which would give a cause of action. Unless there is a duty there can be no negligence, and, when no duty exists, the conduct of the plaintiff is immaterial upon the question of the defendant's liability. A man, knowing that it is raining, and appreciating that if he goes out of doors he will get wet, may voluntarily leave shelter, yet he cannot recover, because no one owed him any duty before or at the time of his act. So, a trespasser going on

Div. 534; *Com. v. Collberg*, 119 Mass. 350; *Adams v. Waggoner*, 33 Ind. 531.

On the application of the maxim, see, also, *Linnehan v. Sampson*, 126 Mass. 506 (saving life); *Horton v. Inhabitants of Ipswich*, 12 Cush. (Mass.) 488; *Wilson v. City of Charlestown*, 8 Allen (Mass.) 137; *Thomas v. Western Union Tel. Co.*, 100 Mass. 156 (obstructed highways); *Jaggard, Torts*, pp. 199-204. See, also, *infra*, § 114.

⁵⁸ Lord Herschell in *Smith v. Baker* [1891] App. Cas. 325.

⁵⁹ *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 158.

lands cannot recover for falling into an excavation, on the same ground of lack of duty; and it is immaterial whether he knew the danger or not or whether he was willing to encounter it. In such cases the maxim is unnecessary. It is only where there is or may be a duty towards the plaintiff that it becomes essential.

Knowledge of the danger and appreciation of the risk must appear before it can be said that the plaintiff consented to take the risk upon himself. "It is plain that knowledge may not be a conclusive defense. There may be a perception of the existence of danger without comprehension of the risk."⁶⁰ "In the first place one does not voluntarily assume a risk who merely knows that there is some danger, without appreciating the danger. On the other hand, he does not necessarily fail to appreciate the risk because he hopes and expects to encounter it without injury. If he comprehends the nature and the degree of the danger, and voluntarily takes his chance, he must abide by the consequences, whether he is fortunate or unfortunate in the result of his venture."⁶¹ "The maxim, be it observed, is not *scienti non fit injuria*, but *volenti*."⁶²

The difficulty has come in defining "*volenti*." The most radical view is expressed by Lord Bramwell: "I hold that where a man is not physically constrained, when he can at his option do a thing or not, and he does it, the maxim applies. What is *volens*? Willing. And a man is willing when he wills to do a thing and does it. No doubt a man, popularly speaking, is said

⁶⁰ Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. Div. 685.

⁶¹ *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 158.

⁶² Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. Div. 685.

to do a thing unwillingly, with no good will; but if he does it, no matter what his dislike is, he prefers doing it to leaving it alone. He wills to do it. He does not will not to do it. I suppose *nolens* is the opposite of *volens*,—its negative. There are two men. One refuses to do the work, wills not to do it, and does not do it. The other grumbles, but wills to do it, and does it. Are both men *nolentes*,—unwilling? Suppose an extra shilling induced the man who did the work. Is he *nolens*, or has the shilling made him *volens*?⁶³ But this is inaccurate. Something more than the exercise of the will to do or not to do an act is required. There must also be a willingness to bear the loss which may happen without looking to the defendant for compensation; in other words, there must be a consent to take the risk arising from the waiver or breach of a duty.⁶⁴

“The question whether in any particular case a plaintiff was *volens* or *nolens* is a question of fact, not law;”⁶⁵

⁶³ *Membery v. Great Western Ry. Co.*, 14 App. Cas. 179, 187. See, also, *Smith v. Baker* [1891] App. Cas. 325, where he says: “A person is never *volens* that he should be injured by negligence,—at least, unless he specially agreed to it;” and “the maxim applies where, knowing the danger or risk, the man is *volens* to undertake the work.”

⁶⁴ “If applicable to the extent that is now insisted on, no person ever ought to have been awarded damages for being run over in London streets, for no one could have crossed London streets without knowing that there was a risk of being run over.” Lord Halsbury, L. C., in *Smith v. Baker* [1891] App. Cas. 325.

“The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to the injury, but whether he agreed that, if injury should befall him, the risk was to be his, and not his master’s.” Lord Watson in *Smith v. Baker*, *supra*.

⁶⁵ *Lindley, L. J.*, in *Yarmouth v. France*, 19 Q. B. Div. 647.

but it is a question of fact which, when the inferences all point one way, must be passed upon by the court. Though the principle of law is well settled, the extent to which the court may properly go in finding the fact of consent on the part of the plaintiff and withdrawing the case from the jury cannot yet be said to be determined.⁶⁶

In master and servant law the maxim becomes important in two classes of cases,—when the risk exists at the time of entering the employment, and when it subsequently arises. Actionable negligence is a breach of a duty owed to the plaintiff whereby he suffers damage. There must be both a duty and a loss through breach of it, and if either is absent, or if the loss is not the proximate result of the breach, there can be no recovery. When a master conducts a business he invites persons to become his servants, and owes a duty in regard to the condition of the premises to which he asks them. He has a right to maintain his premises and machinery in as dangerous a condition as he pleases, but he has no right to lead others into that danger.⁶⁷ If, knowing and appreciating the danger, a person, having freedom of choice, elects to encounter it, then any duty imposed upon the master as to the condition is dispensed with, and the risk of injury is accepted by the plaintiff. “The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognizant of the full extent of the danger, and voluntarily run the risk.”⁶⁸ But when the person does not know

⁶⁶ *Infra*, § 114.

⁶⁷ *Supra*, § 83.

⁶⁸ *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 695.

or appreciate the danger into which he goes, the duty of the occupier is not affected, and, unless he protects the servant or warns him of the danger, he is responsible for the injury that may occur. In this class of cases there is no difficulty in finding the plaintiff's consent, because he has done an act capable of but one construction. Being free to do as he chose, he accepted the employment. Therefore the court need pass upon only one of the elements of the maxim, which is the plaintiff's knowledge of the danger. Here the principle involved in the maxim does away entirely with the duty.⁶⁹

In the second class of cases there are in existence the several duties imposed upon the master in favor of his servant by virtue of the relation existing between them, and the maxim is only invoked where the master has failed to perform a duty which the servant had a right to expect would be fulfilled. Here there is a cause of action needing only the occurrence of loss to be complete, and the question is whether the plaintiff, by his conduct, has consented to waive the breach and take the risk of loss upon his own shoulders. He must, of course, know and appreciate the danger, but the question whether he consents to the breach is not so easily to be determined as in the other class of cases. The defendant's wrong has forced him to take action either by throwing up his employment or by remaining with the chance of injury. It is the general rule that remaining under such circumstances is, as a matter of law, a waiver of the breach; and this act is treated like an acceptance of the employment in the first instance,

⁶⁹ See *infra*, § 88 et seq.

unless facts appear which show that he did not consent to take the risk upon himself.⁷⁰

The broad distinction between the two classes of cases is apparent, and it may well be doubted whether the courts, in holding that the mere fact of continuance in service affords a conclusive inference of consent, as does the act of accepting the employment in the first instance, have not trenched further than is proper upon the province of the jury.

§ 86. Distinction between "*Volenti non fit injuria*" and "contributory negligence."

"*Volenti non fit injuria*" and "contributory negligence" are separate defenses.

A man may deliberately encounter a danger, yet exercise due care to protect himself from injury by it.

The two defenses of contributory negligence and *volenti non fit injuria* are closely related, and it is not always necessary to distinguish them. Both require a knowledge of danger,⁷¹ though in the former it may be a mere recognition of danger or a heedless failure to inquire whether there is danger or not, and in the latter it must be some accurate perception and appreciation of the risk. Both require that the plaintiff should have put himself in the way of injury or have failed to avoid it; but the distinguishing characteristic is deliberate choice in the one case, and lack of choice or thoughtlessness in the other. The defense of *volenti*

⁷⁰ *Infra*, § 114

⁷¹ Statute providing that knowledge of defect shall not bar recovery does not preclude such knowledge being shown on question of negligence. *Buckner v. Richmond & D. R. Co.*, 72 Miss. 873. See, also, *Hawkins v. Johnson*, 105 Ind. 29.

non fit injuria is available only when the plaintiff, being confronted with the danger, wills to encounter it. The defense of contributory negligence applies when the plaintiff exercises no will in the matter whatever, and heedlessly incurs the danger. One is a consent to waive a duty or the breach of a duty, and undertake whatever risk there is without hope of compensation if the risk results in loss. The other is some careless act or omission which brings about, and is the proximate cause of, the injury.

“It may be consistent with due care to incur a known danger voluntarily and deliberately; and this may be so when the danger arises from the known or apprehended neglect of others. Ordinarily, in actions to recover damages for injuries to person or property, an instruction as to the effect of contributory negligence on the part of the plaintiff will cover all that need be said to the jury upon this branch of the case. But the principle that one may be debarred from recovery when he voluntarily assumes the risk is not identical with the principle on which the doctrine of contributory negligence rests, and in proper cases this ought to be explained to the jury. One may, with his eyes open, undertake to do a thing which he knows is attended with more or less peril; and he may, both in entering upon the undertaking and in carrying it out, use all the care he is capable of. But whether or not he thereby assumes the risk may depend on other circumstances. One may, without fault of his own, be in a situation where he must choose a perilous alternative. The degree of danger, the stress of circumstances, the expectation or hope that others will fully perform

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the duties resting on them, may all have to be considered.”⁷² In the case from which this quotation is taken, the plaintiff's servant, going with a horse to the defendant's freight yard, noticed a car in a dangerous position, and, without having the car removed to another place, as he might have done, took the horse by the head and led him in, which resulted in the horse being killed. The defendant requested an instruction: “If the jury find * * * that the person in charge of the horse knew, or would by the use of due care have known, of the condition of the premises, and the use that was made of the same, and the dangers incident thereto, and voluntarily assumed the risk, the plaintiff cannot recover.” The trial court refused to give this request, but instructed fully as to contributory negligence, and it was held that the refusal was erroneous. The most common example of the necessity of making requests for rulings upon one or the other of these defenses is found in cases where the servant remains at work with knowledge of a defect in the place or machinery. The general rule is that in such circumstances he voluntarily incurs the danger, and his recovery is barred on that ground,⁷³ although by his conduct in trying to avoid the danger he may have exercised the greatest care; an instruction bearing only on his contributory negligence does not raise the vital issue.⁷⁴

The distinction is generally recognized,⁷⁵ and is, in

⁷² *Miner v. Connecticut River R. Co.*, 153 Mass. 398, 403; *Wharton*, Neg. § 132.

⁷³ *Infra*, § 114.

⁷⁴ *Carrigan v. Washburn & Moen Mfg. Co.*, 170 Mass. 79; *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71; *Mahoney v. Dore*, 155 Mass. 513, 518; *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155.

⁷⁵ *Indermauer v. Dames*, L. R. 1 C. P. 274, 277; *Woodley v. Metro* (386)

England, now so clearly drawn as to require a finding by the jury that the plaintiff consented to the risk, if the defendant desires to rely upon the defense of *volenti non fit injuria*.⁷⁶

A like distinction is made between the defense of contributory negligence and the assumption of risks by virtue of the contract of service.⁷⁷ When the danger arises from the negligence of fellow servants, or is a danger incident to the business, or arises from a condition of affairs existing at the time of the employment, and known or obvious to the servant, it is assumed by him, and, however great care he may have exercised to avoid injury, he is denied recovery. Here again it is necessary to distinguish between them in the requests or charge.⁷⁸

politan Dist. Ry. Co., L. R. 2 Exch. Div. 384; Thomas v. Quartermaine, 18 Q. B. Div. 685, 697; Union Pac. Ry. Co. v. O'Brien, 161 U. S. 451; Peirce v. Clavin (C. C. A.) 82 Fed. 550; Narramore v. Cleveland, C., C. & St. L. Ry. Co. (C. C. A.) 96 Fed. 298; Romona Oolitic Stone Co. v. Phillips, 11 Ind. App. 118, 147; Gaar-Scott Co. v. Wilson, 21 Ind. App. 91.

In Alabama, the distinction seems not to have been taken. "Contributory negligence, which would defeat an action, might have consisted of a failure on the part of the plaintiff, either to reasonably give notice of the defect in appliances used in his employment, or of the negligence of his superiors, if known to him, which produced the injury; or of a failure, after having given such notice, to quit the service to which such defect or negligence was incident, after a reasonable time had elapsed for its correction." Columbus & W. Ry. Co. v. Bradford, 86 Ala. 574; Eureka Co. v. Bass, 81 Ala. 201; Highland Ave. & B. R. Co. v. Walters, 91 Ala. 435; *infra*, § 87. Such is the case in Colorado. Colorado Central R. Co. v. Ogden, 3 Colo. 499; Wells v. Coe, 9 Colo. 159, 163.

⁷⁶ Williams v. Birmingham Battery & Metal Co. [1899] 2 Q. B. 338; Osborne v. London & N. E. Ry. Co., 21 Q. B. Div. 221.

⁷⁷ *Infra*, § 88.

⁷⁸ Pingree v. Leyland, 135 Mass. 398; Taylor v. Carew Mfg. Co.,

The failure of courts to make the distinction causes much confusion in the cases, but, as these defenses so often glide into each other, it is seldom necessary or advantageous to place the decision upon one ground rather upon the other. However, unless the distinction is kept in mind, error may result.

§ 87. Pleading assumption of risk.

The distinction between "assumption of risk," meaning the risks assumed upon entry into the employment, and assumption of risk, covering the defenses of contributory negligence and "*volenti non fit injuria*," is observed generally in pleading. The former is part of the plaintiff's case; the latter are strictly defenses.

The rule is established in England that the plaintiff's statement of claim must allege knowledge of the condition on the part of the defendant, and want of knowledge on the part of the servant to make out his cause of action for risks existing upon entry into the employment. "Where it is an action by a servant against his master for the wrongful condition of the machinery on the premises on which the plaintiff is to act, or of the condition of the means by which the services of the servant are to be fulfilled, if the servant confines the allegations in his statement of claim to alleging the existence of danger in any of these things, owing to the negligence of the master, he shows no cause of action. * * * The old form of declaration used to show that the danger which caused the accident was known to the master and unknown to the servant.

140 Mass. 150; *Linch v. Sagamore Mfg. Co.*, 143 Mass. 206; *French v. Columbia Spinning Co.*, 169 Mass. 531; *Hoard v. Blackstone Mfg. Co.*, 177 Mass. 69; *supra*, note 75.

Both these allegations are material, because without them there is no cause of action, and unless it was proved at the trial directly, or that there were facts from which it might be inferred, that the servant was ignorant of the existence of the danger, he would be nonsuited. For the plaintiff it was contended that his knowledge was a mere matter of defense, and that it should so appear as a matter of pleading; but this is not true, for the old form of declaration, as I have already pointed out, must have shown ignorance on the part of the servant.”⁷⁹

The same rule is adopted in Indiana. “In suits by the servant against the master for his negligent failure to furnish a safe place or safe machinery or appliances for the servant’s task, the law must now be regarded as settled in Indiana, by repeated adjudications, that knowledge is an undisputed element of liability not included in the general averment of negligence or want of negligence. * * * The servant’s knowledge or want of knowledge must be specially alleged, because upon this it depends whether or not he is to be held to have assumed the risk of the defect, assumption of the risk and contributory negligence being separate and independent factors.”⁸⁰ “To sustain such allegations,

⁷⁹ Griffiths v. London & St. K. D. Co., 12 Q. B. Div. 493, 13 Q. B. Div. 259. The servant need not, however, allege that he had not the same means of knowledge as his master. Williams v. Clough, 3 Hurl. & N. 258.

⁸⁰ New Kentucky Coal Co. v. Albani, 12 Ind. App. 497; Pennsylvania Co. v. Witte, 15 Ind. App. 583; Pierce v. Oliver, 18 Ind. App. 87 (subsequent risk); Gaar-Scott Co. v. Wilson, 21 Ind. App. 91 (subsequent risk); Creamery Package Mfg. Co. v. Hotsenpiller, 24 Ind. App. 122; Chicago & E. I. R. Co. v. Richards (Ind. App.) 61 N. E. 18 (under act); Cleveland, C., C. & St. L. Ry. Co. v. Parker, 154

however, the evidence must show that the employer not only had no knowledge of the defect, but could not have known the same by the exercise of ordinary care."⁸¹ But in Indiana no distinction is made between risks arising after the employment and those existing at the time, and the rule of pleading is the same.⁸²

In Alabama the plaintiff need not allege his ignorance of the defect,⁸³ and *volenti non fit injuria* is an affirmative defense, not admissible under a general denial, and

Ind. 153. He must aver not only that he did not know, but that he did not have equal means of knowing, the defect. *Indiana, B. & W. Ry. Co. v. Dailey*, 110 Ind. 75 (subsequent risk); *Spencer v. Ohio & M. Ry. Co.*, 130 Ind. 181; *Bodell v. Brazil Block Coal Co.*, 25 Ind. App. 654. A general allegation rebuts both actual and constructive knowledge. *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 156. These allegations may be in general terms. *Lake Erie & W. R. Co. v. McHenry*, 10 Ind. App. 525. But alleging that plaintiff was "free from fault" is not sufficient. *Louisville, N. A. & C. Ry. Co. v. Corps*, 124 Ind. 427. General allegations of ignorance may be overcome by recitals from which it appears that plaintiff must have known. *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 156; *Louisville & N. R. Co. v. Kemper*, 147 Ind. 561. Must allege that negligent employe was not a fellow servant. *Helfrich v. Williams*, 84 Ind. 553.

⁸¹ *Consolidated Stone Co. v. Summit*, 152 Ind. 297. An instruction ignoring the element of knowledge is wrong. *Terre Haute & I. R. Co. v. Pruitt*, 25 Ind. App. 227.

⁸² Cases cited above. Thus, a promise to repair must be pleaded, but the time necessary to make the repairs need not be alleged. *Daugherty v. Midland Steel Co.*, 23 Ind. App. 78; *McFarlan Carriage Co. v. Potter*, 21 Ind. App. 692, 153 Ind. 107. See *infra*, § 115. If a servant is sent outside his employment, lack of knowledge need not be alleged. *Clark County Cement Co. v. Wright*, 16 Ind. App. 630. But see *Louisville & N. R. Co. v. Orr*, 84 Ind. 50, where it is said that "assumption of risk" is not contributory negligence, and is an affirmative defense, not admissible under a general denial.

⁸³ *Columbus & W. Ry. Co. v. Bradford*, 86 Ala. 573; *Broslin v. Kansas City, M. & B. R. Co.*, 114 Ala. 398.

is raised by the plea of contributory negligence.⁸⁴ Neither in this state nor in Colorado is the difference between the defenses clearly distinguished.⁸⁵

In Massachusetts, although the plaintiff is not required to plead his ignorance of the defect, yet the burden is on him of showing that the risk was not assumed upon his entrance into the employment. Thus, he must show that the negligence was not that of a fellow servant, or that it did not arise from an obvious danger.⁸⁶

The burden of proving that he did not, by his entrance into the employment, assume the risks of it, is therefore on the plaintiff, whether he is required to plead it or not;⁸⁷ and in those jurisdictions where he must allege his actual or constructive knowledge it is impossible to presume that he possessed such knowledge, but it must be determined on the evidence.⁸⁸

When the risk is one arising after the employment, there must in any event, to permit recovery, be a breach of duty owed by the defendant, and the only

⁸⁴ *Columbus & W. Ry. Co. v. Bradford*, 86 Ala. 574; *Bridges v. Tennessee C., I. & R. Co.*, 109 Ala. 287. See, also, *Eureka Co. v. Bass*, 81 Ala. 201; *Highland Ave. & B. R. Co. v. Walters*, 91 Ala. 435.

⁸⁵ *Colorado Central R. Co. v. Ogden*, 3 Colo. 499; *Wells v. Coe*, 9 Colo. 159, 163. Need not plead no means of knowledge, *Denver, T. & Ft. W. R. Co. v. Smock*, 23 Colo. 456. See, as to allegations in declaration, *Browne v. King* (C. C. A.) 100 Fed. 561.

⁸⁶ Stated to be a "defense." *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135. See, also, *Baker v. Barber Asphalt Paving Co.*, 92 Fed. 117. Contractual assumption of the risk goes to cause of action, and need not be pleaded by defendant.

⁸⁷ *Ames v. Lake Shore & M. S. Ry. Co.*, 135 Ind. 363; *Chicago, I. & L. Ry. Co. v. Glover*, 154 Ind. 584.

⁸⁸ *Louisville, E. & St. L. C. R. Co. v. Miller*, 140 Ind. 685; *Bedford Belt Ry. Co. v. Brown*, 142 Ind. 659.

way in which he may be relieved of his liability is through the plaintiff's contributory negligence or through his voluntary assumption of the risk.⁸⁹ These are both strictly affirmative defenses, and therefore, denying the plaintiff's right to recover, ought in the first instance to be pleaded by the defendant, upon whom would then rest the temporary duty of offering evidence on the issue.

The views taken of the defense of contributory negligence have been elsewhere considered, and it is found that, using burden of proof in a double sense, there is a conflict between the several jurisdictions, both as to the manner of pleading and the burden of proving the allegation.⁹⁰

Volenti non fit injuria is also an affirmative defense, and it would seem that it should be alleged by the defendant, and that he should be bound to go forward with evidence under it, although the final burden of establishing his right to recover rests upon the plaintiff. This view has been stated in Massachusetts,⁹¹ and is the view taken of the statutory defense of knowledge under the act.⁹² In Alabama and Colorado, where the distinction between *volenti non fit injuria* and contributory negligence is not taken, both defenses must be raised by the defendant.⁹³ The rule laid down in Indiana, that the plaintiff must allege lack of knowledge, actual or constructive, plead a promise to repair, and

⁸⁹ Supra, § 82; infra, § 102.

⁹⁰ Supra, § 84.

⁹¹ *Scanlon v. Wedger*, 156 Mass. 462, 465; *Davis v. Forbes*, 171 Mass. 548. See *Kilberg v. Berry*, 166 Mass. 488.

⁹² Infra, § 117.

⁹³ Alabama and Colorado cases above cited.

the like,⁹⁴ would seem to be erroneous on principle, and to have resulted from the unfortunate failure to distinguish the meanings of the phrase "assumption of risks," which has led to confusion in the cases.

§ 88. Contractual assumption.

By acceptance of the employment a servant assumes all risks of injury caused—

(a) By the negligence of competent fellow servants. Section 89.

(b) By the dangers incidental to the business. Sections 90, 91.

(c) By the dangers arising from the existing condition of the premises, machinery, etc., which are known or ought to be known to the servant at the time. Section 92 et seq.

No duty is imposed upon the master to protect the servant against these risks, and he consequently cannot be guilty of negligence.

The rights and disabilities which attach to a servant, viewed in his twofold capacity of servant and invited person, and the duties owed by the master to him in each capacity,⁹⁵ are fixed as between them at the moment of entrance into the employment, and continue while it lasts. These mutual rights and duties are called terms in the contract of service, and, whenever an injury occurs, the court has the preliminary duty of construing this contract and determining whether the cause of the injury was a risk which the master had agreed to guard against, or a risk which the servant had

⁹⁴ Indiana cases above cited. See, also, *Oregon Short Line & U. N. Ry. Co. v. Tracy* (C. C. A.) 66 Fed. 931. *Volenti non fit injuria* must be pleaded by defendant, and, unless it is set up, evidence that plaintiff knew the defect is inadmissible.

⁹⁵ *Supra*, § 83.

agreed to run.⁹⁶ The decision of the question of the master's liability may be reached in either of two ways,—the court may consider solely the plaintiff's conduct or position in reference to the risk, and say that on his own showing he assumed it, the defendant's duty or breach of duty being immaterial; or it may view the circumstances from the defendant's standpoint, and find that no duty was imposed upon him in regard to the cause of the injury. Either method brings the same result, but, as the former is in most cases the simpler, it is the one adopted.

"This may be called a contractual assumption of risk. In regard to the dangers covered by it, the employer owes the employe no duty, and he cannot be held guilty of negligence."⁹⁷

These risks fall into three classes: First, because the plaintiff is a servant, the policy of the law denies him what it gives to all others,—the benefit of the principle *respondeat superior*,—and disables him from recovering for an injury caused by the negligence of a competent fellow servant in performing duties that are not personal to the master;⁹⁸ and, second, because the plaintiff is a servant he may not recover for an injury caused by dangers natural and incidental to the business itself.⁹⁹ The master owes him no duty as to these risks, and the servant assumes them.

The ground upon which a servant is held to assume

⁹⁶ *Infra*, § 118.

⁹⁷ *Davis v. Forbes*, 171 Mass. 548, 554. The doctrine of contractual assumption of risks applies only to actions by a servant against his master. *Infra*, § 101

⁹⁸ *Infra*, § 89.

⁹⁹ *Infra*, § 90.

the first of these risks,—that of the negligence of fellow servants—is public policy strictly, and not because of the principle expressed in the maxim, *Volenti non fit injuria*, or by reason of a contract between the parties. The maxim requires a duty on the part of the defendant, a knowledge and appreciation arising from its breach, and a consent to run the risk of injury from it.¹⁰⁰ The obligation of a master to answer to strangers for the negligence of his servants in the scope of their employment is imposed upon him by the policy of the law, and is enforced irrespective of his own care. He is made, in effect, an insurer. The policy which imposes the obligation in favor of a stranger takes it away in the case of a servant, and the reason is that a servant may more easily protect himself from the risk than the master can protect him,—he may more easily observe the conduct of his associates; and, were the rule otherwise, the carrying on of business would be impossible. The maxim does not apply because the knowledge of the servant as to the duty or his appreciation of risk from the breach of it is immaterial. Whatever knowledge he has is imposed by law upon him. There is nothing which by observation he could discover. There is no present risk which he accepts, nor can it be foreseen how or when the danger may arise, and nothing that can be done by either party will diminish it. The lack of knowledge prevents also the implication of a contract having the elements of an express contract, since there is no meeting of minds.

The risks incidental to the business are not assumed by virtue of the maxim. The defendant has a right to

¹⁰⁰ Supra, § 85.

conduct the business, and the risks natural to it are ones "which the master cannot control,"¹⁰¹ however great his care. Like the negligence of a servant, the occurrence of the danger or the form in which it may arise cannot be foreseen. The exemption is more properly placed upon the ground of contract, since the servant may, and is presumed to, know the incidental risks of the business he enters, and the compensation may be regulated accordingly.

These exemptions are not limited or defined by the scope of the plaintiff's employment, but, in general, extend to all servants, not performing the master's duty, engaged in the common employment, and to all dangers of the business, wherever they may arise.

The third class of risks comprised in this "contractual assumption" are those which the plaintiff assumes, not as servant, but as invited person on the employer's premises.¹⁰² The duty which an employer owes as occupier of premises having elements of danger upon them is determined by the knowledge and appreciation of the danger possessed by him who is invited there. If the danger is known and the employment is accepted, no duty exists as to that danger, and the risk of injury from it is assumed by the servant. If knowledge or appreciation is lacking, then the master is bound to warn of the risk before the acceptance of the employment, or be liable for the loss caused by it. The assumption of these risks depends upon the maxim, *Volenti non fit injuria*.¹⁰³

When, having a knowledge and appreciation of the

¹⁰¹ Gilman v. Eastern R. Corp., 10 Allen (Mass.) 233, 236.

¹⁰² Supra, § 83.

¹⁰³ Supra, § 85.

dangerous condition of premises, a person is free to accept or reject the service, and he enters it, he has shown a willingness to encounter the danger by this unequivocal act, and must, as a matter of law, be held to have disintitled himself to recovery. The question passed upon by the court, therefore, is not whether he consented to run the danger, because his conduct leaves no doubt on that score if he was aware of it, but what he knew concerning the danger. If knowledge and appreciation of it are found, his acceptance is presumed. If the servant knew the danger, no difficulty is presented;¹⁰⁴ but, where he did not in fact know of it, he is only to be charged with knowledge when the conditions are such that his ignorance is not consistent with due precaution; he is held to know whatever a person of his knowledge, experience, and capacity might have observed and appreciated by exercising reasonable care.¹⁰⁵ If the danger is not of such a character, or the plaintiff, by reason of his incapacity, is unable to recognize or appreciate it, then he does not assume it, and a master, if he fails to warn concerning it, may be liable for the resulting loss.¹⁰⁶ The duty of warning is the converse of the assumption of obvious risks, and both depend upon what the master may reasonably believe the plaintiff knows and the extent of his knowledge.¹⁰⁷

The risks which are thus assumed are those reasonably to be included in the scope of the invitation or the employment. They are only such dangers as the servant expects and is expected to meet in doing the work

¹⁰⁴ *Infra*, § 93.

¹⁰⁵ *Infra*, §§ 92-96.

¹⁰⁶ *Infra*, § 99.

¹⁰⁷ *Infra*, §§ 97, 98.

he is hired to perform. When the injury happens from dangers outside the scope of employment undertaken, when the plaintiff entered the service, the master's liability depends upon whether the servant, of his own accord, encountered them, or whether he was sent to meet them by his employer, and therefore became an invited person as to them.¹⁰⁸

The three classes of risks above enumerated form the disabilities imposed upon entry into the employment, and, having been then undertaken by the servant, he cannot recover for any loss which arises through them, whenever that loss may occur. The relationship established between the parties furthermore affixes certain duties upon the master as such, which continue during the employment, and which cannot be delegated by him. He is bound to use reasonable care to hire and retain competent servants, provide and maintain reasonably safe and suitable machinery, appliances, materials, and places for the work to be done, and to warn the servant of dangers and defects arising from them or from the work as it is carried on, and which the servant is not bound to know.¹⁰⁹ Of these several rights and disabilities of the parties, some arise from the policy of the law, others from general principles of conduct, and some from what may fairly be said to be a contract between the parties. It is therefore inaccurate to say that they make terms in an implied contract of service, and to treat the rights and duties of the parties as though there were technically a contract between them.¹¹⁰ The

¹⁰⁸ *Supra*, § 83; *infra*, §§ 102-105.

¹⁰⁹ *Supra*, §§ 1, 83.

¹¹⁰ *Supra*, § 82.

phrase "contract of service" is, however, convenient to express the mutual rights, but it should not be used as a basis of reasoning, and treated as if consideration and a meeting of minds were present.

The duties of the master as to furnishing safe places, machinery, and the like are founded upon and measured by the condition of affairs existing at the time of accepting the employment, the risks of which the servant has assumed. He is bound to keep the ways, works, and machinery in substantially the same condition, and is guilty of negligence if he permits them to deteriorate while the employment continues. He cannot, without liability, increase the risks which the servant has assumed, but changes, alterations, repairs, additions, and the like, within the limit of those risks, impose no responsibility upon him. Thus, where setscrews were used in a factory, and after the employment one was placed in a shaft where previously there had been none, the plaintiff, not knowing of the previous condition of the shaft or of the presence of a setscrew in it, could not recover.¹¹¹ So, where a railroad changed the direction in which its trains were run,¹¹² or used cars of different patterns,¹¹³ or where a plaintiff slipped on a strip of pasteboard laid on newly varnished stairs,¹¹⁴ there could be no recovery.

Master's negligence is not assumed.

The risk that the master will himself be negligent is

¹¹¹ *Ford v. Mt. Tom Sulphite Pulp Co.*, 172 Mass. 544 (court).

¹¹² *Naylor v. New York Cent. & H. R. R. Co.*, 33 Fed. 801 (court).

¹¹³ *Peirce v. Bane* (C. C. A.) 80 Fed. 988 (court).

¹¹⁴ *McIntire v. White*, 171 Mass. 170 (court).

not assumed by the servant,¹¹⁵ and, where the master owes any duty to the servant, he cannot escape liability by delegating its performance to an agent.¹¹⁶

§ 89. Fellow servants.

The servant assumes the risk of the negligence of competent fellow servants not engaged in performing duties personal to the master.

The common law has laid down the rule that natural justice and sound policy require that a master shall not be held responsible to one servant for the negligent act of another servant in the common employment; and this principle is expressed by an implied contract between the parties that the master will use reasonable care to hire and retain in his service competent servants, and that the servant will bear any loss which may come to him from the negligence of such servants without recourse to the master. Upon entry into the employment the servant waives the obligation towards strangers imposed on a master by the policy of the law, to answer in damages for losses occasioned by the negligence of his servants in the course of their employment; and it is not material whether this waiver be placed upon the ground of contract or upon the creation of a *status*.¹¹⁷ The rule applies to all who become servants, whether they are of full age and competent to contract or not.¹¹⁸

¹¹⁵ *Smith v. Baker* [1891] App. Cas. 325; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Colorado Cent. R. Co. v. Ogden*, 3 Colo. 499; *George v. Clark* (C. C. A.) 85 Fed. 608; *Texas & P. Ry. Co. v. Archibald*, 170 U. S. 665.

¹¹⁶ *Supra*, § 55; *infra*, §§ 89, 99. See *Eureka Block Coal Co. v. Wells* (Ind. App.) 61 N. E. 236 (boss appointed under statute).

¹¹⁷ *Supra*, §§ 1, 82, 83, 88.

¹¹⁸ *King v. Boston & W. R. Corp.*, 9 Cush. (Mass.) 112; *supra*, § 82. (400)

A servant cannot be heard to complain that he did not know or did not appreciate the principle, since it is a legal incident of the relationship into which he has entered.¹¹⁹ Inasmuch as it is a disability imposed upon the servant quite apart from his knowledge or willingness to accept it, the case does not fall within the maxim, *Volenti non fit injuria*, or the assumption of a risk with which he is confronted, by his conduct in reference to it.

There is some difference in the several jurisdictions as to the extent of this exemption, but it is generally held that all persons who serve a common master are fellow servants, save such as perform duties personal to the master. The master being bound, or having agreed, to hire or retain competent servants, maintain reasonably safe and suitable places and machinery, and warn or instruct his employes, cannot, by turning over the performance of these obligations to a servant, thereby escape liability.¹²⁰ The risk of a master's negligence is not assumed, and the plaintiff does not assume the risk of the negligence of other servants acting as his delegates.¹²¹

The employers' liability acts¹²² are directed to this exemption, and are intended to decrease the risks which a servant assumes by holding the master responsible for the negligent acts of servants specified in the statute. The defense of fellow service is taken from the master when a plaintiff shows that the injury was caused by

¹¹⁹ *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441, 445; *Siddall v. Pacific Mills*, 162 Mass. 378. See *Morgan v. Smith*, 159 Mass. 570, 573.

¹²⁰ *Supra*, §§ 1, 37, 55.

¹²¹ *Supra*, § 88.

¹²² *Supra*, §§ 2, 73; *infra*, § 116.

the negligence of a superintendent, of a person to whose orders the plaintiff was bound to conform, of persons intrusted with the duty of seeing that the ways, works, machinery, or plant are in proper condition, or of certain servants in the charge or control of portions of the equipment of a railway.¹²³

When the negligent servant is not one specified in the act, or, if the action is at common law, is not charged with the performance of duties personal to the master, the plaintiff, upon entrance into the employment, assumed the risk of injury from his carelessness; but since the master is bound to hire and retain competent servants, if it can be shown that he has failed in fulfilling this duty, the plaintiff may recover. He did not agree to run the risk of the master's negligence in this regard.

Competence of servant.

In hiring his servants, the master is bound to use reasonable care to select men competent to do the work required, both by reason of their good habits and carefulness, as well by reason of their skill and fitness to perform the duties demanding special qualifications. The master does not warrant the competency of his servants, and to permit a recovery it must appear that he failed to use ordinary care in the selection of them. Hiring a servant whose general reputation is bad, who is generally known as an habitual

¹²³ Supra, §§ 2, 38, 56, 64, 73; *Bowie v. Rankin*, 13 Rettle, Ct. Sess. Cas. (4th Ser.) 981; *Malcolm v. Fuller*, 152 Mass. 160; *Davis v. New York, N. H. & H. R. Co.*, 159 Mass. 532; *Murphy v. City Coal Co.*, 172 Mass. 324, 327; *Millard v. West End St. Ry. Co.*, 173 Mass. 512; *Knight v. Overman Wheel Co.*, 174 Mass. 455; *Hopkins v. O'Leary*, 176 Mass. 258.

drunkard, or as reckless in the performance of his duties, is a lack of ordinary care, and employing a man in a service requiring more than ordinary skill and experience to perform it with safety, without inquiry or examination, is evidence of negligence.

Not only must this care be exercised when a servant is hired, but the duty continues during the employment. It is the master's duty to keep himself advised of the continued fitness of the men in his employ, and to discharge such as reasonable care shows to be incompetent, for any reason, to perform their duties with safety to others. The duty is personal to the master, and cannot be delegated by him.¹²⁴

¹²⁴ "The same degree of care which a railroad company should take in providing and maintaining its machinery must be observed in selecting and retaining its employees, including telegraph operators. Ordinary care on its part implies, as between it and its employees, not simply the degree of diligence which is customary among those intrusted with the management of railroad property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered." *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454.

"If the master has failed to exercise ordinary or reasonable care in the selection of his servant, in consequence of which he has in his employ a servant who, by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of want of the requisite skill to discharge the duties he is employed to perform, or for any other cause, is unfit for the service in which he is engaged, and if, in consequence of such unfitness, an injury happens to another servant, the master must answer for the damages suffered by such servant." *Ohio & M. Ry. Co. v. Collam*, 73 Ind. 261.

"Nor does he fully discharge all of the obligations to his servants by fully inquiring concerning the applicant's fitness at the time he takes him into the service. It is the master's duty to exercise proper supervision over the work of his servants, and through such su-

When the master acquires knowledge of the incompetence of his servant, he may have a reasonable time

perception to keep himself advised as to the continued fitness of those in his employ. It was therefore entirely proper to show that the company, through its proper agents, did know, or ought to have known from a due supervision of its employes, that Harrison was an unfit man for engineer, by showing that he had the general reputation of an habitual and excessive drinker of intoxicating liquors." *Baltimore & O. R. Co. v. Henthorne* (C. C. A.) 73 Fed. 634. See, also, *Chicago & G. E. Ry. Co. v. Harney*, 28 Ind. 28; *Indianapolis & St. L. Ry. Co. v. Johnson*, 102 Ind. 352; *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450; *Cayzer v. Taylor*, 10 Gray (Mass.) 274; *Colton v. Richards*, 123 Mass. 484; *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374; *McDermott v. City of Boston*, 133 Mass. 349; *Tyson v. South & N. A. R. Co.*, 61 Ala. 554; *Conrad v. Gray*, 109 Ala. 130; *Kindel v. Hall*, 8 Colo. App. 63; *Melville v. Missouri River, F. S. & G. R. Co.*, 48 Fed. 820; *Gravelle v. Minneapolis & St. L. Ry. Co.*, 10 Fed. 711; *Tarrant v. Webb*, 18 C. B. 797; *Hutchinson v. York, N. & B. Ry. Co.*, 5 Exch. 343; *Allen v. New Gas Co.*, 1 Exch. Div. 251.

The injury must be the proximate result of the incompetence of the servant. *Chicago & E. I. R. Co. v. Beatty*, 13 Ind. App. 604; *Central R. R. of New Jersey v. Keegan* (C. C. A.) 82 Fed. 174. The reputation of the servant must be a general bad reputation in order to charge the master with negligence in hiring or retaining him. *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267; *Monahan v. City of Worcester*, 150 Mass. 439. His reputation among a few workmen is insufficient. *Driscoll v. City of Fall River*, 163 Mass. 105.

Habitual intemperance, *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233, 13 Allen (Mass.) 433; *McPhee v. Scully*, 163 Mass. 216; *Crew v. St. Louis, K. & N. W. Ry. Co.*, 20 Fed. 87; *Baltimore & O. R. Co. v. Henthorne* (C. C. A.) 73 Fed. 634. Habitual carelessness, *Northern Pac. R. Co. v. Mares*, 123 U. S. 710; *Olsen v. North Pacific Lumber Co.*, 106 Fed. 298; *Lake Shore & M. S. Ry. Co. v. Stupak*, 123 Ind. 210; *Cincinnati, H. & I. Ry. Co. v. Madden*, 134 Ind. 462. Unskillfulness, *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454 (telegrapher); *Spencer v. Ohio & M. Ry. Co.*, 130 Ind. 181 (engineer); *Ohio & M. Ry. Co. v. Dunn*, 138 Ind. 18 (fireman in charge of engine); *Parker v. Sample*, 11 Ind. App. 698 (engineer); *Tyson v. South & N. A. R. Co.*, 61 Ala. 554 (engineer). Examination, (404)

to discharge him or to caution him.¹²⁵ Notice of incompetency may be given by a servant to his master, or to the agent having authority to hire or discharge men; but this notice, to be effectual to charge the master with negligence, cannot be given to another servant who has no authority in the premises.¹²⁶

"Specific acts of negligence cannot be introduced to show the incompetency of a servant. The reason of this rule is that such evidence might present a multiplicity of issues that could not properly be tried together. In other jurisdictions the authorities on this question are conflicting. But it has never been held in this commonwealth, when conduct of a fellow servant tending to show his qualifications or his mental or physical fitness or unfitness for his work is properly before a jury upon one of the issues of the case, that they are forbidden to consider it on the question of his competency. * * * Of course, it is not competent on the question whether his employer was negligent in hiring him or re-

Indiana Mfg. Co. v. Millican, 87 Ind. 87 (hiring without inquiry); Evansville & T. H. R. Co. v. Guyton, 115 Ind. 450 (promoting without inquiry); Louisville & N. R. Co. v. Kelly (C. C. A.)' 63 Fed. 407 (promoting without regard to competency); Edwards v. London & B. Ry. Co., 4 Fost. & F. 531 (promotion). See, also, Anderson v. New York & T. S. S. Co., 47 Fed. 38 (deafness); Olsen v. Andrews, 168 Mass. 261 (nervousness); Ledwidge v. Hathaway, 170 Mass. 348 (nervous and infirm); Ohio & M. Ry. Co. v. Collam, 73 Ind. 261 (disobedience); Louisville & N. R. Co. v. Davis, 91 Ala. 487 (one-armed brakeman); Monahan v. City of Worcester, 150 Mass. 439 (physical infirmity); Hall v. Bedford Quarries Co., 156 Ind. 460 (ignorant and inexperienced foreigner).

¹²⁵ Louisville, N. A. & C. Ry. Co. v. Breedlove, 10 Ind. App. 657; Lake Shore & M. S. Ry. Co. v. Stupak, 123 Ind. 210.

¹²⁶ Acme Coal Min. Co. v. Melver, 5 Colo. App. 267; Kidwell v. Houston & G. N. Ry. Co., 3 Woods, 313, Fed. Cas. No. 7,757.

taining him in his service, without independent proof that the employer ought to have discovered his incompetency."¹²⁷

§ 90. Dangers incidental to the business.

The servant assumes the risk of dangers natural and incidental to the business in which he is engaged.

Any business, however carefully it may be conducted, has, as incident to the nature and character of it, certain risks and perils which may at any time cause injury. There is nothing unlawful or negligent in the carrying on of a dangerous business.¹²⁸ "Every service has its own peculiar hazards, and the law does not hold the master accountable for such hazards as ordinarily and naturally belong to any service."¹²⁹ The master is in no better position to guard the servant from injury from them than the servant is himself. They are dangers beyond his control.

When a servant enters such an occupation, he takes upon himself the risk of injury from dangers incidental to it, and the master owes him no duty in regard to them. A servant offering himself for such work is pre-

¹²⁷ *Olsen v. Andrews*, 168 Mass. 261, 265; *Peaslee v. Fitchburg R. Co.*, 152 Mass. 155; *Summersell v. Fish*, 117 Mass. 312 (rigging derrick); *Hatt v. Nay*, 144 Mass. 186; *Kennedy v. Spring*, 160 Mass. 203 (building staging); *Connors v. Morton*, 160 Mass. 333; *Gordon v. West End St. Ry. Co.*, 175 Mass. 181 (starting car quickly); *Conrad v. Gray*, 109 Ala. 130 (negligence on the occasion only, not sufficient). But see *Evansville & T. H. R. Co. v. Tohill*, 143 Ind. 49 (ordering trains to run ahead of time); *Pittsburgh, Ft. W. & C. Ry. Co. v. Raby*, 38 Ind. 294.

¹²⁸ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 585. See *Mather v. Rillston*, 156 U. S. 391.

¹²⁹ *Bedford Belt Ry. Co. v. Brown*, 142 Ind. 659, 665.
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sumed to know the dangers, and the master is not required to warn or instruct concerning them, unless it appears that the servant is ignorant, and the master knows the fact.¹³⁰ "When it is said that the servant assumes the risk of dangers of which he has knowledge, it is not meant that he assumes no risks except from dangers of which he has actual knowledge or which are patent, for he does assume the risk of latent as well as patent dangers, which are a natural incident of the service, and which it is not the duty of the master to guard against; that is, dangers, whether visible or invisible, known or unknown, at the time of the employment, if they are such as naturally arise from the nature of the work to be performed, he assumes."¹³¹

The risk of negligence of fellow servants is treated as one of the incidental risks of business,¹³² and so "the risk of accident from the previous negligence of servants in their own field is one of the ordinary risks of the business which the employe assumes by virtue of his contract on entering the service."¹³³

Incidental risks include not only what may be called the permanent risks of the business, examples of which

¹³⁰ *Infra*, §§ 98, 99.

¹³¹ *Linton Coal & Mining Co. v. Persons*, 15 Ind. App. 69; *Perry v. Marsh*, 25 Ala. 659, 667; *Colorado Midland Ry. Co. v. O'Brien*, 16 Colo. 219. See *Dynen v. Leach*, 26 Law J. Exch. 221. See, also, *infra*, § 92, note 6.

¹³² *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49.

¹³³ *O'Connor v. Rich*, 164 Mass. 560. The master had furnished a supply of proper materials, out of which servants built a staging carelessly, and the plaintiff, upon entering the service, was injured by it. Had the staging been such as the master could not properly intrust to servants, he would have been liable. *Hall v. Bedford Quarries Co.*, 156 Ind. 460 (hiring incompetent servants not an ordinary risk).

are given below, but also those temporary or transitory risks arising from the changing condition of the materials or places about which the servant is engaged and as to which warning or notice is impracticable. These cases are contained in the next section.

In deciding whether the servant assumed the risk of injury, the court must find whether the cause of the accident was one natural to the business, and, if so, the plaintiff's knowledge and consequent assumption of it are presumed. If, however, it is impossible to say as a matter of law that the risk was incident, because there is a conflict of evidence, the question is submitted to the jury.

Railroads.

Among the hazards peculiar to the business of operating railroads, which the court has held employes assume, are dangers of collisions caused by carelessness of other servants;¹³⁴ the rules of moving trains when brought to the servant's knowledge;¹³⁵ methods of shifting cars,¹³⁶ but not that they will be kicked off at unreasonable speed;¹³⁷ the methods of running cars in quarries.¹³⁸ The dangers of coupling cars are incidental to the business,¹³⁹ and the servant must contemplate the possibility that foreign cars may have drawbars of different heights,

¹³⁴ *Mitchell v. Northern Pac. R. Co.*, 70 Fed. 15 (court).

¹³⁵ *Little Rock & M. R. Co. v. Barry* (C. C. A.) 84 Fed. 944 (jury).

¹³⁶ *Coombs v. Fitchburg R. Co.*, 156 Mass. 200 (court).

¹³⁷ *Caron v. Boston & A. R. Co.*, 164 Mass. 523 (jury).

¹³⁸ *Hoosier Stone Co. v. McLain*, 133 Ind. 231.

¹³⁹ *Gravelle v. Minneapolis & St. L. Ry. Co.*, 10 Fed. 711 (jury); *Woodworth v. St. Paul, M. & M. Ry. Co.*, 18 Fed. 282 (jury); *Southern Pac. Co. v. Burke* (C. C. A.) 60 Fed. 704 (jury). See, also, *infra*, § 108.

and take the risk of them. The master owes no duty to inspect cars in this particular,¹⁴⁰ but where the drawbars are defective,¹⁴¹ or where the drawbar of an engine owned by the defendant is lower than other cars owned by it,¹⁴² the risk is not incidental.

A servant whose duty is to handle defective cars assumes the risk of injury from them,¹⁴³ and when it is customary to place damaged cars on side track upon notice being given of their condition, although the plaintiff was accustomed to look out for himself, the court held: "These are omissions of notice in respect to matters of detail which cannot be given in advance, and which are not like an omission to give instructions to an inexperienced hand as to the general dangers to which his service will expose him. * * * It was an incident to the service which the plaintiff undertook, that broken cars might be put in the wrong place in the yard, and that insufficient notice of the defects in them might be given."¹⁴⁴

A brakeman assumes "the possibility that when boarding freight cars, or riding on them, he might come in

¹⁴⁰ *Ellsbury v. New York, N. H. & H. R. Co.*, 172 Mass. 130 (court); *Pennsylvania Co. v. Ebaugh*, 144 Ind. 687; *Whitcomb v. Standard Oil Co.*, 153 Ind. 513 (court); *Atchison, T. & S. F. R. Co. v. Myers* (C. C. A.) 63 Fed. 793 (court); *Hodges v. Kimball* (C. C. A.) 104 Fed. 745 (court); *Peirce v. Bane* (C. C. A.) 80 Fed. 988 (court); *Kohn v. McNulta*, 147 U. S. 238.

¹⁴¹ *Bowers v. Connecticut River R. Co.*, 162 Mass. 312.

¹⁴² *Lawless v. Connecticut River R. Co.*, 136 Mass. 1.

¹⁴³ *Chesapeake & O. R. Co. v. Hennessey* (C. C. A.) 96 Fed. 713 (court).

¹⁴⁴ *Yeaton v. Boston & L. R. Co.*, 135 Mass. 418 (court); *infra*, § 91.

contact with switches or structures near the tracks."¹⁴⁵ But low bridges are not incidental risks,¹⁴⁶ nor an oil box carelessly left by a servant near the track.¹⁴⁷

Sharp curves¹⁴⁸ and steep grades¹⁴⁹ are incidental risks, and the dangers, though greater in a mountainous country, are assumed. So, where the plaintiff is employed upon a roadbed in process of construction, the roughness, unevenness, and similar dangers of the track are incidental to his occupation;¹⁵⁰ but he does not take the risk of unusual dangers unless he knows of them, and thus, if the injury is caused by defective spiking,¹⁵¹ or by running the train at unreasonable speed and stopping suddenly,¹⁵² it is not assumed.

The explosion of a locomotive boiler, which could not have been prevented by inspection, is an incidental risk.¹⁵³ But defects or dangers which may be ordinarily prevented by care are not incidental. Thus, defective car wheels,¹⁵⁴ a "live" engine causing a collision;¹⁵⁵ unnecessary jerks in starting engine, caused either by de-

¹⁴⁵ *Dacey v. New York, N. H. & H. R. Co.*, 168 Mass. 479 (court); *infra*, § 95.

¹⁴⁶ *Louisville, N. A. & C. Ry. Co. v. Wright*, 115 Ind. 378; *Pennsylvania Co. v. Sears*, 136 Ind. 460.

¹⁴⁷ *Louisville & N. R. Co. v. Bouldin*, 121 Ala. 197 (jury).

¹⁴⁸ *Tuttle v. Detroit, G. H. & M. Ry.*, 122 U. S. 189 (court).

¹⁴⁹ *Patton v. Southern Ry. Co. (C. C. A.)* 82 Fed. 979 (court).

¹⁵⁰ *Evansville & Richmond R. Co. v. Barnes*, 137 Ind. 306 (court); *Colorado Midland Ry. Co. v. O'Brien*, 16 Colo. 219 (jury); *infra*, § 95.

¹⁵¹ *Colorado Midland Ry. Co. v. Naylor*, 17 Colo. 501.

¹⁵² *Coughlan v. City of Cambridge*, 166 Mass. 268.

¹⁵³ *Louisville & N. R. Co. v. Allen's Adm'r*, 78 Ala. 494.

¹⁵⁴ *Union Pac. Ry. Co. v. Daniels*, 152 U. S. 684.

¹⁵⁵ *Southern Pac. Co. v. Lafferty (C. C. A.)* 57 Fed. 536.

fects or the negligence of a person in charge or control.¹⁵⁶

An engineer takes the risk of going on the running board of his engine while it is in motion.¹⁵⁷ Where a rule requires stones loaded on flat cars to be blocked in a certain way, the risk of a brakeman's hand being crushed by the failure to block is not assumed.¹⁵⁸

Street railways.

The incidental dangers of operating street railways are in many respects the same as in steam railroads,—the jolting of cars, condition of tracks, and movement of cars. The danger arising from the swing of a running board as the car rounds a curve is incidental to the business;¹⁵⁹ and where a switchman, being frightened by running horses on a car, stepped on the other track, and was struck by another car, he could not recover.¹⁶⁰

Shipping.

Where the method adopted in unloading steamers was to keep them in position without lines, the dangers were incidental.¹⁶¹ The plaintiff was ordered to jump ashore from a tugboat, but this was a duty for which he was

¹⁵⁶ Highland Ave. & B. R. Co. v. Miller, 120 Ala. 535.

¹⁵⁷ Southern Pac. Co. v. Johnson (C. C. A.) 69 Fed. 559.

¹⁵⁸ Austin v. Fitchburg R. Co., 172 Mass. 484; George v. Clark (C. C. A.) 85 Fed. 608.

¹⁵⁹ Goldthwait v. Haverhill & G. St. Ry. Co., 160 Mass. 554 (court).

¹⁶⁰ Thompson v. Citizens' St. Ry. Co., 152 Ind. 461; Hall v. Wakefield & S. St. Ry. Co., 178 Mass. 98 (presence of people on running board).

¹⁶¹ Red River Line v. Cheatham (C. C. A.) 60 Fed. 517 (court); Red River Line v. Smith (C. C. A.) 99 Fed. 520 (court).

hired, and he could not recover.¹⁶² Open hatchways are incidental dangers.¹⁶³ But the court cannot say, as a matter of law, that the slipping of a rope on a winch is an ordinary risk of the business.¹⁶⁴

Electricity.

Linemen assume, as incident to their employment, the rottenness or breaking of poles. "One of the most common and obvious of these [risks], in reference to which both he and his employer must have been presumed to have contracted when he entered the defendant's service, was the risk that some pole of uncertain age might break and fall when a lineman was working upon it, if he did not take measures to ascertain its condition before going upon it. All the evidence tends to show that in the ordinary course of the business the linemen, who are often expected to work alone without supervision, as the plaintiff was working at the time of the accident, would examine the poles for themselves, so far as they considered it necessary for them to do so for their safety. * * * There is no evidence that the risk of falling on account of the weakness of old poles was not a risk of the business which the plaintiff assumed by his contract to work upon such poles. As between the plaintiff and the defendant, the defendant was under no obligation to inspect the poles to see whether they were decayed, and there was therefore no evidence of negligence on the part of the defendant."¹⁶⁵ The risk of

¹⁶² Phillips v. The Pilot, 82 Fed. 111.

¹⁶³ Malone v. Western Transp. Co., 5 Biss. 315, Fed. Cas. No. 8,996 (court).

¹⁶⁴ Bean v. Oceanic Steam Nav. Co., 24 Fed. 124.

¹⁶⁵ McIsaac v. Northampton Electric Lighting Co., 172 Mass. 89 (412)

falling from an insufficiently guyed "gin pole" is also incidental.¹⁶⁶

Live wires are incidental risks. "The danger from an imperfectly insulated wire is the most characteristic risk which a lineman has to encounter. * * * Everybody knows that there is always a chance that the insulation of a wire may become worn off or defective from some cause, and that in a circuit of miles it is more than a chance that such an event will happen somewhere."¹⁶⁷

Mining.

The dangers incidental to the business of mining are more conveniently considered among the cases of obvious dangers. The falling of slate in a mine is said to be incidental to that business, as it is to quarrying;¹⁶⁸ and also that one engaged in digging gravel takes the risk of an overhanging bank falling upon him.¹⁶⁹

Construction of buildings.

The dangers which arise during the erection of buildings, bridges, and the like are more properly considered

(court); *Dixon v. Western Union Tel. Co.*, 71 Fed. 143 (court; pole too rotten to hold spikes); *Western Union Tel. Co. v. Burgess* (C. C. A.) 108 Fed. 26 (jury; rotten pole). Contra, *Tracy v. Western Union Tel. Co.*, 110 Fed. 103.

¹⁶⁶ *Greene v. Western Union Tel. Co.*, 72 Fed. 250 (court).

¹⁶⁷ *Chisholm v. New England T. & T. Co.*, 176 Mass. 125 (court).

¹⁶⁸ *Linton Coal & Mining Co. v. Persons*, 15 Ind. App. 69; *Hobbs v. Salem-Bedford Stone Co.*, 22 Ind. App. 436; *Salem-Bedford Stone Co. v. Hobbs*, 11 Ind. App. 27, 144 Ind. 146 (court); *Hall v. Bedford Quarries Co.*, 156 Ind. 460 (fall of stones loaded on car).

¹⁶⁹ *Railsback v. Wayne County Turnpike Co.*, 10 Ind. App. 622; *Griffin v. Ohio & M. Ry. Co.*, 124 Ind. 326.

in the succeeding section, since they are transitory risks, caused by the changing conditions under which the employe works.

Manufacturing.

Each business has its own peculiar hazards, and, when these are of a permanent nature, the servant is presumed to know and take the risk of them. When they arise during the progress of the work, warning is impracticable, and, as is noted subsequently, the servant takes also the risk of these. But a "risk which the master has created by doing or permitting something to be done, or by omitting some precaution which in the exercise of ordinary care ought to have been taken, cannot be regarded as one of the ordinary risks of any employment."¹⁷⁰ Cases are collected below.¹⁷¹

It will be noticed that in the majority of cases, where the court has held, as a matter of law, that the risk was incidental to the business, it has determined the fact upon its own knowledge of the operation or character of the business without evidence upon the subject.¹⁷²

¹⁷⁰ *George v. Clark* (C. C. A.) 85 Fed. 608.

¹⁷¹ *Myers v. De Pauw Co.*, 138 Ind. 590 (court; breaking of glass in glass factory); *Melville v. Missouri River, F. S. & G. R. Co.*, 48 Fed. 820 (splinters flying from blacksmith's hammer); *Murphy v. American Rubber Co.*, 159 Mass. 266 (court; wet and slippery floor); *Johnson v. Field-Thurber Co.*, 171 Mass. 481 (jury; trap doors in shoe factories not incidental); *Campbell v. Dearborn*, 175 Mass. 183 (court; piling long and short boards together, incidental to lumber business). But it is not an incidental risk when a tripod falls into sewer trench (*Powers v. City of Fall River*, 168 Mass. 60); when shafting falls in mill (*Knight v. Overman Wheel Co.*, 174 Mass. 455; *Copithorne v. Hardy*, 173 Mass. 400).

¹⁷² See *infra*, § 119.

§ 91. Transitory risks.

The servant assumes the risk of injury from transitory dangers arising from the changing conditions of the work, against which it is impracticable to warn.

The servant may properly rely upon the performance by the master of his obligation to furnish safe places, materials, and appliances for the work to be done, and if, in the course of the work, these places, materials, or appliances become dangerous, he may expect to be warned of the fact. But a series of cases has laid down the rule that this obligation of maintaining the plant constantly in a safe condition, or of warning when it is not so, does not apply when the nature of the work is such that the condition of safety is constantly changing as the work progresses, and the dangers which arise are such as the servant, equally well with the master, may guard against. The servant is entitled to warning and notice of the dangers ordinarily incident to the business, when he does not know and is not bound to know them; but he cannot expect to be warned of "all the passing risks which arise from short-lived causes," when the only thing he does not know about them is the precise time when the danger will exist.

"Obviously, there are limits to the duty of employers to provide for the safety of their workmen,—limits set by what is practicable in a commercial sense, and limits set by what naturally is to be expected under the circumstances. The chief sphere of the duty is in the permanent or recurring conditions of the machinery or the place where the workman is employed, so far as it is under the employer's control, where the danger is not obvious or necessarily incident to the business. An

extreme example is *Burgess v. Davis Sulphur Ore Co.*¹⁷³ But there are many momentary dangers which, though hidden, it is impracticable to guard against by inspection, and for which on this ground the employer is held not liable. There are others which, even if permanent conditions of the business, are obvious without warning, and of which the workman must take the risk if he accepts employment there. There are others which are both transitory and obvious, or at least equally easy to be discovered by employer and employed. When a room has been shattered by an explosion, it is plain to everybody that things are not in their normal condition, that the usual support of part by part has been shaken or interfered with, and that some portion may have been weakened to the point of being ready to fall. * * * When a workman is sent into such a room on the day of the explosion to clear away the ruins, it is manifest that he is taking one of the steps which is necessary to disclose just what has happened. It is not a natural inference on the part of one so sent that the place has been inspected, and it is not a natural interpretation of the offer to take it that the superior knows that it is safe. Such an inference and interpretation are not based on the experience of life; they are mere deductions from the letter of an inaccurately stated rule of duty assumed beforehand to cover the case. Some one must be first in the place of possible danger. The workman sent in to clean it up has no right to assume that he is not the first, nor is the employer bound in formal language to notify him that no one yet has made cer-

¹⁷³ 165 Mass. 71 (rock in mine, shattered by blast, fell; superintendent said it was safe; jury).

tain that nothing will give way.”¹⁷⁴ In this case the risk that a piece of iron would fall on the plaintiff was one which was incident to the business, and as to which warning was impracticable. And such is the case where a carpenter at work on a building in course of erection steps on a partly sawed joist or through an open hole;¹⁷⁵ or where one shoveling coal in a bin, and knowing the manner in which coal is unloaded, is injured by a load being unexpectedly dumped;¹⁷⁶ or where one at work in a foundry pours melted iron into molds which happen to be damp;¹⁷⁷ or where one knowing that there is a trapdoor in the floor does not know the precise time when it may be opened.¹⁷⁸

¹⁷⁴ *Kanz v. Page*, 168 Mass. 217, 218 (court); *Colorado Coal & Iron Co. v. Lamb*, 6 Colo. App. 255 (making roof of mine safe); *Easton v. Houston & T. C. Ry. Co.*, 39 Fed. 65 (court; repairing bridge); *Slavens v. Northern Pac. Ry. Co. (C. C. A.)* 97 Fed. 255 (clearing landslide from track). See *infra*, § 112.

¹⁷⁵ “The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows.” *Armour v. Hahn*, 111 U. S. 313 (stepping on projecting timber); *McCann v. Kennedy*, 167 Mass. 23 (court; sawn joist); *Beique v. Hosmer*, 169 Mass. 541 (court; open hole); *Stuart v. New Albany Mfg. Co.*, 15 Ind. App. 184 (court; fall of beam); *Yager’s Adm’r v. Receivers*, 88 Fed. 773 (court; giving way of bridge being built). Where one groping in the dark falls into open hole (*Murphy v. Greeley*, 146 Mass. 196 [court]), or into manhole on ship being built (*Forsyth v. Ramage*, 18 Rettie, Ct. Sess. Cas. [4th Ser.] 21 [court]), he cannot recover.

¹⁷⁶ *Flynn v. Campbell*, 160 Mass. 128, 130 (court).

¹⁷⁷ *Whittaker v. Bent*, 167 Mass. 588 (court).

¹⁷⁸ *Moore v. Ross*, 17 Rettie, Ct. Sess. Cas. (4th Ser.) 796 (court); *Young v. Miller*, 167 Mass. 224 (court). Compare *Hogarth v. Pocasset Mfg. Co.*, 167 Mass. 225 (jury; plaintiff did not know of door).

' But unless the risk is one which may be expected to occur in the business, the employe is entitled to notice of it. "A workman assumes the risk of such transitory changes as are incident to and ordinarily may be expected to occur in the prosecution of the work in which he is engaged, whether arising from the operation of natural causes or otherwise. But in the present case [where a superintendent stood on the bank of a trench which was cracked and fell] there was nothing to show whether cracks like that shown to have existed here are liable to occur in digging or blasting out trenches for sewers, and, if so, how frequently, and whether the plaintiff should have anticipated the crack which occurred; and we think, therefore, that it could not be ruled, as a matter of law, that the risk was one which the plaintiff assumed."¹⁷⁹

The duty of warning in regard to these dangers is clearly stated in a case where the plaintiff, a brakeman, was injured by a damaged car which was not, according to the custom of the road, placed on a side track, or notice given that the car was damaged. He knew that broken cars were to be moved and handled in the yard, and knew the danger of them. "It was incident to a service of this description that broken cars might sometimes be put in the wrong place in the yard, and that insufficient notice of defects in them, and of their being put in the wrong place, might be given. These are omissions of notice in respect to matters of detail, which cannot be given in advance, and which are not like an omission to give instructions to an inexperienced hand as to the general dangers to which his service will expose him. * * *

¹⁷⁹ McCoy v. Inhabitants of Westborough, 172 Mass. 504, 507 (jury).
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The distinction between the two cases is plain. The one is a notice of the nature of the risk and peril to be incurred in the course of the employment; the other is a notice of the special danger which springs out of a particular fact, which, in its details, cannot be anticipated. The danger arising from the attempt to move a particular car which may happen to come into the yard for repairs, like the danger which would arise from an attempt to split upon a circular saw a particular warped board, is one which, in the nature of the case, it is impossible for a master to point out on every occasion when the workman may be called upon in the course of his employment to use such material. If there was a neglect in such case to give such information to the plaintiff as ought to be given by one upon whom the duty has been devolved by the master, such neglect is to be treated as that of a fellow servant, and the risk of it must fall within the ordinary rule, because it was an incident to the service which the plaintiff undertook, that broken cars might be put in the wrong place in the yard, and that insufficient notice of the defects in them might be given. This is not like a case where dangerous or defective machinery is supplied by a master for a servant to use in his work, and where notice of such danger or defect ought to be given; but it is a case where the material to be handled and to be worked upon is understood to involve risk and the necessity of care."¹⁸⁰ Other cases are collected below.¹⁸¹

¹⁸⁰ *Yeaton v. Boston & L. R. Corp.*, 135 Mass. 418 (court); *Dodge v. Boston & A. R. Co.*, 155 Mass. 448 (court; defective car).

¹⁸¹ *Thompson v. Norman Paper Co.*, 169 Mass. 416 (court; plaintiff sent into vat slipped on wet beam); *Staldter v. City of Huntington*, 153 Ind. 354 (court; striking dynamite in trench); *Browne v. King*

§ 92. Dangers arising from the condition of affairs.

A servant, by accepting the employment, impliedly agrees to assume all risk of injury arising from the existing condition of affairs, however dangerous that condition may be; provided that—

(a) He knows and appreciates the danger.

(b) Or in the exercise of reasonable care would know and appreciate it.

(c) And if the danger is obvious he is held to know and appreciate it.

As to such dangers the master owes no duty to the servant. As to dangers which due care would not disclose to him the master is bound to warn him.

The third class of risks¹⁸² included in the contractual assumption of risks undertaken by the servant upon his entry into the employment are those dangers which he expects, and is expected, to encounter in the performance of the services he is hired to do, and which arise from the existing and apparently permanent conditions of the business as it is conducted by the master. These are risks which a servant undertakes in his capacity of invited person, and whether his assumption, and the master's consequent freedom from liability in regard to them, be placed upon the ground of contract or not, the court has found it more convenient to treat it as though there were a contract between the parties which it is primarily the duty of the court to construe. In construing the contract the court looks at the subject-

(C. C. A.) 100 Fed. 561 (court; plaintiff's drill struck "missed hole"); *City of Minneapolis v. Lundin* (C. C. A.) 58 Fed. 525 (court; failure of foreman to inform that dynamite had failed to explode). See, also, *infra*, § 99.

¹⁸² *Supra*, § 88.

matter, and then at the knowledge of the plaintiff concerning it, and if it finds that there is a danger, and this was known to and appreciated by the servant, then his "acceptance of the employment is an acceptance of the attendant risk."¹⁸³ The chief consideration and the chief difficulty in every case—and it is apparent that each case must stand upon its own facts, and cannot establish a rule to be followed in other cases—is the knowledge possessed by the plaintiff. Occasionally this is unimportant, as when it appears that the plaintiff actually knew,—and in the majority of cases the character of the danger is such that the plaintiff must have known it unless he recklessly closed his eyes; but where this is doubtful, and especially where the plaintiff is a man without experience in the business, or where the plaintiff is a child, the facts must often be passed upon by the jury, and not by the court. The exactness and extent of the plaintiff's knowledge sometimes become material. The remaining divisions of this chapter are devoted to the consideration of these questions.

There is a distinction to be made between the dangers which are incidental to the nature of the business that have previously been considered,¹⁸⁴ and those other dangers which arise from the method in which the master chooses to conduct his own occupation. As to the former the risks are beyond the master's power of control; as to the latter they are entirely within his control; and thus the question presented for decision in the two cases is not the same. In the former, if the court finds the danger incidental to the business, the plaintiff

¹⁸³ *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 333.

¹⁸⁴ *Supra*, §§ 90, 91.

is presumed to know it, and, as the master cannot guard him, he must protect himself whenever the danger is evident; in the latter the master is *prima facie* at fault by inducing the servant to come to premises which might be made safer for his reception, but, if the servant chooses to come, he waives the duty as to those dangers which he may know, and the duties of protection and of warning are not imposed where the servant may protect himself or already knows the risks against which he must guard.

"Nor can it be doubted that it is the legal right of every person to carry on a business which is dangerous, either in itself or in his manner of conducting it, if it is not unlawful and interferes with no rights of other persons."¹⁸⁵ "The risks of the service are assumed, even if the business be ever so dangerous, and if it might easily be conducted more safely by the employer.

* * * The reason on which it is founded is that, whatever may be the master's general duty to conduct his business safely in reference to persons who may be affected by it, he owes no legal duty in that respect to one who contracts to work in the business as it is."¹⁸⁶

There is no duty imposed upon the master to change this dangerous condition of the business, and the servant's disabilities are imposed with reference to it. "Parties entering into a contract for service by one of them make their engagements in reference to the subject-matter to which the contract relates, and their rights and liabilities depend upon the contract as applied to the sub-

¹⁸⁵ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 585.

¹⁸⁶ *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 157; *Bethlehem Iron Co. v. Weiss (C. C. A.)* 100 Fed. 45; *Tynen v. Leach*, 26 Law J. Exch. 221.

ject with which they are dealing. The employe impliedly agrees to assume all the obvious risks of the business in which he contracts to work. Among these are the open, manifest dangers attendant upon the use of the ways, works, and machinery of a permanent character, that are plainly intended to be retained as a part of the plant to which the contract for service relates. It has often been held that an employer owes his employe no duty to change a business in these particulars in order to make it safer, even though in some parts his ways and works would not be deemed reasonably safe and proper if he were starting a new establishment to do the same kind of work under an arrangement with employes to serve in a business afterwards to be established. So far as risks are obvious pertaining to the apparently permanent features of the business as it is openly conducted, an employer has a right to believe that his employe agrees to assume them. They are, therefore, not included among those to be guarded against in the performance of his general duty to furnish reasonably safe appointments for the employe, and the employer cannot be held guilty of negligence in failing to make provision against them."¹⁸⁷

¹⁸⁷ *Murch v. Wilson's Sons & Co.*, 168 Mass. 408, 410. Such is the general rule. "If the plaintiff, being of sufficient age and intelligence to understand the nature of the risk to which he was exposed, and, with full notice of the dangerous nature of the service which he undertook, chose to contract to do it, then he assumed the risk which was clearly within the scope of his employment, and his employer was under no obligation to indemnify him against the consequences. * * * The implied contract to have the machinery in such safe and proper condition as not to expose the servant to unnecessary risk is the foundation of the master's liability. If the servant, being fully capable of choosing and contracting for

Acceptance of the employment is an acceptance of the risks, and so, although the plaintiff may have com-

himself, and, with full notice of the risk which he assumes, chooses to undertake a hazardous employment, to put himself in a dangerous position, or to work with defective or unsuitable tools, machinery, or appliances, no such implied contract arises." *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 585.

"In ordinary cases, where a workman is employed to do a dangerous job, or to work in a service of peril, if the danger belongs to the work which he undertakes, or the service in which he engages, he will be held to all the risks which belong either to the one or the other. But where there is no danger in the work or service by itself, and the peril grows out of extrinsic causes or circumstances, which cannot be discovered by the use of ordinary precaution and prudence, the employer would be answerable precisely as a third person if the injury or loss was occasioned by his neglect or want of care. In such a case, the injury would be outside of the employment, and the employer would, as to such injury, be in fact a third person, and fall within the same rule as to responsibility. We are clear, also, that, without reference to the fact whether the injury or loss was occasioned by the carelessness or neglect of the employer in not using due care in relation to the cause of the danger (as in allowing the walls or roof of a building to remain for an unreasonable length of time in a condition hazardous to the safety of others), if he employs a workman in a service which is apparently safe, but which becomes hazardous from causes disconnected with the service, and not discoverable by the exercise of ordinary prudence, he would be bound, upon the strongest principles of morality and good faith, to disclose to those whom he has employed the dangers to which they were exposing themselves, if those dangers were known to him; and the failure to make this disclosure, under such circumstances, would be a breach of duty, for which the employer would be held responsible if, while engaged in the work, the workman sustained an injury." *Perry v. Marsh*, 25 Ala. 659, 667.

"It is an elementary principle of law, governing the relation of master and servant, that when a servant enters upon an employment which is, from its nature, necessarily hazardous, the servant assumes the usual risks and perils of the service, and this is especially true as to all those risks which require only the exercise of ordinary observation to make them apparent. In such cases, there is an implied contract on the part of the servant to take all

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plained of the dangerous conditions which he found, yet if he enters the service he takes the risk of them.¹⁸⁸ The only inference to be drawn from his act of acceptance of the employment is a willingness to encounter the risks he finds.¹⁸⁹

the risks fairly incident to the service, and to waive all right of action against the master for injuries resulting from such hazards. This waiver includes, on the part of the servant, all such risks as, from the nature of the business, usually and ordinarily conducted, he must have known when he embarked in the master's service, and also those risks which the exercise of his opportunities for inspection, while giving diligent attention to such service, would have disclosed to him. * * * Where the danger is equally open to the observation of both the master and the servant, both are upon common ground, and the master is not liable, as a general rule, for resulting injuries, * * * if there are latent dangers known to the master, or which he might have known by the use of diligence, or dangers which are patent, but of such character as that they might reasonably be supposed to escape the notice of the servant, it is the duty of the master to give his servant notice of such dangers; failing in which, he will be held liable to the servant for any injury he may receive by reason of such neglect." *Evansville & Richmond R. Co. v. Henderson*, 134 Ind. 636, 639.

"An employe assumes all the risks naturally and reasonably incident to the service in which he engages, and those arising from defects or imperfections in the thing about which he is employed that are open and obvious, or that would have been known to him had he exercised ordinary diligence." *Denver Tramway Co. v. Nesbit*, 22 Colo. 408, 411.

See, also, *Taylor v. Carew Mfg. Co.*, 140 Mass. 150; *Hatt v. Nay*, 144 Mass. 186; *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135; *Davis v. Forbes*, 171 Mass. 548; *Lake Shore & M. S. Ry. Co. v. McCormick*, 74 Ind. 440; *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151; *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 534; *Railroad Co. v. Fort*, 17 Wall, (U. S.) 553; *Hough v. Railway Co.*, 100 U. S. 213; *Reed v. Stockmeyer (C. C. A.)* 74 Fed. 186; *Clarke v. Holmes*, 7 Hurl. & N. 937; *Woodley v. Metropolitan Ry. Co.*, 46 Law J. Exch. 521; *Thomas v. Quartermaine*, 18 Q. B. Div. 685; *Saxton v. Hawksworth*, 26 Law T. (N. S.) 851. See, also, cases cited *infra*.

¹⁸⁸ *Kenney v. Hingham Cordage Co.*, 168 Mass. 278.

¹⁸⁹ *Thomas v. Quartermaine*, 18 Q. B. Div. 685.

§ 93. Dangers known to servant.

Dangers existing at the time of the contract, which were actually known to him, are assumed by the servant.

Actual knowledge of the dangers existing in the business is conclusive upon the question of the servant's assumption of them;¹⁹⁰ and it must appear that he knew of the condition or defect that caused his injury, although he need not know details which may increase the degree of danger.¹⁹¹

The source of the plaintiff's knowledge is immaterial if in fact he possesses it. If he is told of it by a stranger or by another servant, or discovers it from his own investigations, he assumes the risk as fully as if the master had himself warned him in regard to it.¹⁹²

In the cases cited below, where the plaintiff showed on his own testimony that he knew of the danger, no distinction has been made between dangers that were known to him when he entered the employment, and dangers either at first unknown to him or subsequently arising, of which he acquired knowledge. As will be seen in a later section,¹⁹³ it is the general rule that known dangers subsequently arising are waived or accepted by the fact of continuance in the employment. Examples of known dangers are given below.¹⁹⁴

¹⁹⁰ *Joyce v. City of Worcester*, 140 Mass. 245 (court; dangerous method of drawing out shoring). Former statement of plaintiff that he knew is an admission. *Barker v. Lawrence Mfg. Co.*, 176 Mass. 203.

¹⁹¹ *Infra*, § 97.

¹⁹² *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Alabama Connelville C. & C. Co. v. Pitts*, 98 Ala. 285; *Bessemer Land & Imp. Co. v. Dubose*, 125 Ala. 442; *infra*, § 99.

¹⁹³ *Infra*, § 114.

¹⁹⁴ Objects near track, *Lovejoy v. Boston & L. R. Corp.*, 125 Mass (426)

When the plaintiff himself has charge of the appliances, or has helped construct the defective structures,

79 (court; engineer struck post; knew posts were being erected, but not about this particular one); *Fisk v. Fitchburg R. Co.*, 158 Mass. 238 (court; brakeman getting down from wide car at night struck awning); *Bell v. New York, N. H. & H. R. Co.*, 168 Mass. 443 (court; brakeman going down side ladder at night struck pillar of bridge); *Quinn v. New York, N. H. & H. R. Co.*, 175 Mass. 150 (court; brakeman on large car struck station roof); *infra*, § 95. Railroad equipment, *Ladd v. New Bedford R. Co.*, 119 Mass. 412 (court; check chains on cars absent); *Burlington & C. R. Co. v. Liehe*, 17 Colo. 280 (defective handcar); *Coombs v. Fitchburg R. Co.*, 156 Mass. 200 (court; position of switch and the making of flying switches); *Birmingham Ry. & E. Co. v. Allen*, 99 Ala. 359 (court; defective switch); *Wood v. Locke*, 147 Mass. 604 (court; unblocked frogs caused injury when coupling); *O'Neil v. Keyes*, 168 Mass. 517 (court; unblocked tracks caught yardmaster passing in front of train); *Dillon v. Union Pac. R. Co.*, 3 Dill. 319, Fed. Cas. No. 3,916 (court; no bell in cab); *Horne v. Old Colony R. Co.*, 161 Mass. 180 (court; spikes in sleepers); *Bedford Belt Ry. Co. v. Brown*, 142 Ind. 659 (wedge under track); *McCauley v. Springfield St. Ry. Co.*, 169 Mass. 301 (court; street-car conductor knowing uneven track and jolting); *Colorado Central R. Co. v. Ogden*, 3 Colo. 499 (jury; road-bed out of repair, and plaintiff's signal to train not seen). Trap doors, holes, etc., *Young v. Miller*, 167 Mass. 224 (court; trap door); *Hoard v. Blackstone Mfg. Co.*, 177 Mass. 69 (court; elevator hole); *Lynch v. Chicago, St. L. & P. R. Co.*, 8 Ind. App. 516 (hole in plank-ing). Dynamite, *Stalder v. City of Huntington*, 153 Ind. 354 (court; possibility of unexploded charge); *Allard v. Hildreth*, 173 Mass. 26 (court; possibility of unexploded charge). Incompetent fellow servants, *Hoey v. Dublin & B. J. Ry. Co.*, 5 Ir. R. C. L. 206 (court); *Hatt v. Nay*, 144 Mass. 186 (court); *Acme Coal Mining Co. v. McIver*, 5 Colo. App. 267; *Toledo, St. L. & K. C. R. Co. v. Trimble*, 8 Ind. App. 333; *Chicago & E. I. R. Co. v. Beatty*, 13 Ind. App. 604; *Lake Shore & M. S. Ry. Co. v. Stupak*, 108 Ind. 1; *Indiana, B. & W. Ry. Co. v. Dailey*, 110 Ind. 75; *Spencer v. Ohio & M. Ry. Co.*, 130 Ind. 181; *New York & T. S. S. Co. v. Anderson* (C. C. A.) 50 Fed. 462 (jury); *Oien v. The Antonio Zambrana*, 89 Fed. 60 (court); *Northern Pac. R. Co. v. Mares*, 123 U. S. 710. Vicious horses, *Fraser v. Hood*, 15 Rettle, Ct. Sess. Cas. (4th Ser.) 178 (court); *Yarmouth v. France*, 19 Q. B. Div. 647 (jury); *Levesque v. Janson*,

he must, as a matter of law, have knowledge of the risk.¹⁹⁵

Rules established by the master form a part of the contract of service when they are brought to the actual knowledge of the servant.¹⁹⁶

165 Mass. 16 (court); *Denver Tramway Co. v. O'Brien*, 8 Colo. App. 74 (court; escape of steam frightened horse). Machinery, etc., *Pin-gree v. Leyland*, 135 Mass. 398 (court; absence of guard on winch); *Linch v. Sagamore Mfg. Co.*, 143 Mass. 206 (court; turning steam into pipes filled with water); *Campbell v. Dearborn*, 175 Mass. 183 (court; method of piling boards); *Silvia v. Wampanoag Mills*, 177 Mass. 194 (court; repairing defect); *Baker v. Barber Asphalt Pav. Co.*, 92 Fed. 117 (court; low gateway); *Detroit Crude-Oil Co. v. Grable* (C. C. A.) 94 Fed. 73 (court; projecting bolts); *Barry v. New York Biscuit Co.*, 177 Mass. 449 (court; boxes piled on elevator fell); *Lewis v. New York & N. E. R. Co.*, 153 Mass. 73 (rotten planking). Methods of work, *Smith v. Baker* [1891] App. Cas. 325 (jury; use of derrick); *Globe Smelting Co. v. Spann*, 6 Colo. App. 146 (melting iron); *Kielly v. Belcher Silver Min. Co.*, 3 Sawy. 500, Fed. Cas. No. 7,761 (court; insufficient warning of blast).

¹⁹⁵ *Newly-constructed roadbed*, *Evansville & R. R. Co. v. Doan*, 3 Ind. App. 453; *Baltimore & O. S. Ry. Co. v. Welsh*, 17 Ind. App. 505; *Evansville & R. R. Co. v. Barnes*, 137 Ind. 306; *Evansville & R. R. Co. v. Henderson*, 142 Ind. 596; *Perigo v. Indianapolis Brewing Co.*, 21 Ind. App. 338 (scaffold); *Pennsylvania Co. v. Congdon*, 134 Ind. 226 (lantern); *Big Creek Stone Co. v. Wolf*, 138 Ind. 496; *Wolf v. Big Creek Stone Co.*, 148 Ind. 317 (owner of derrick); *Wells v. Coe*, 9 Colo. 159 (brake); *Texas & P. Ry. Co. v. Patton* (C. C. A.) 61 Fed. 259; *Patton v. Texas & P. Ry. Co.* (C. C. A.) 95 Fed. 244 (plaintiff had repaired step on locomotive); *Texas & P. Ry. Co. v. Smith* (C. C. A.) 67 Fed. 524 (plaintiff's duty to inspect bridge); *Erskine v. Chino Valley Beet-Sugar Co.*, 71 Fed. 270 (rope); *O'Brien v. Staples Coal Co.*, 165 Mass. 435 (stepping on rope of apparatus rigged by plaintiff); *Sloss I. & S. Co. v. Knowles* (Ala.) 30 South. 584 (had placed defective props in mine). Having accepted the responsibility of moving the staging, the plaintiff cannot say it was negligence on the defendant's part to clothe him with it. *Arnold v. Eastman Freight Car Heater Co.*, 176 Mass. 135; *Drum v. New England Cotton Yarn Co.*, Dec. 21, 1901, Mass. (stepladder).

¹⁹⁶ *Cincinnati, I., St. L. & C. Ry. Co. v. Lang*, 118 Ind. 579; *Louis* (428)

The court, in construing the contract of service, is obliged to determine whether the danger is of such a character that an ordinarily prudent and careful man would have noticed and appreciated it. Both the facts of danger and of knowledge must be found, and when, from a consideration of the character of the danger, the only possible inference is that the servant, unless reckless, would have known it, his assumption of the risk follows as a matter of law. The two succeeding sections consider when this inference is possible.

§ 94. Reasonable care to discover dangers.

The servant is presumed to have knowledge of all dangers caused by the manner in which the business is conducted, or by the existing condition of affairs, which he might have known through the exercise of reasonable care.

“That the plaintiff did not in fact know of the particular danger when he made his contract is immaterial, if with the exercise of due diligence he might have known it.”¹⁹⁷ “It is his duty to use ordinary care in informing himself of the dangers and responsibilities attending his employment, and to take the same degree of care in avoiding accident and injury. This duty on his part is said to be correlative to the master’s duty of employing a like measure of care for the servant’s protection and safety. Moreover, the servant’s duty in this regard, like that of his master, is a continuing one.”¹⁹⁸

ville, N. A. & C. Ry. Co. v. Heck, 151 Ind. 292. See Quinn v. New York, N. H. & H. R. Co., 175 Mass. 150; *infra*, § 109.

¹⁹⁷ Gleason v. Smith, 172 Mass. 50, 52. See Ferren v. Old Colony R. Co., 143 Mass. 197.

¹⁹⁸ Wells v. Coe, 9 Colo. 159, 166; Chicago, R. I. & P. Ry. Co. v. Linney (C. C. A.) 59 Fed. 45.

The master may expect that the servant will exercise ordinary care to protect himself, and the servant may, on the other hand, expect that the dangers which he sees are the only ones to which he will be exposed, and that if there are others the master will inform him of them. Thus, although there may be an equal opportunity to discover defects, the duty to investigate and discover them is not the same,¹⁹⁹ and, when the plaintiff has noticed what ordinary care would disclose to him, he is not to be further charged with a knowledge of dangers which, though he had an opportunity to examine, only extraordinary care would lead him to do so. As to such dangers he may rely on the master to discover them and warn him.

§ 95. Obvious dangers.

The servant assumes the obvious risks arising from the condition of affairs. Dangers of such a character that this servant, either through the common knowledge he is presumed to possess, or through the intelligence and experience it appears that he has, must have known and appreciated, or have been guilty of contributory negligence in failing to know and appreciate, them.

But if the dangers are not of this character, a jury must determine whether the plaintiff was negligent in not observing them.

In every case, the court, as a preliminary question, is

¹⁹⁹ *Infra*, § 112. See, also, as to the assurance of a foreman, with authority to hire men, that a mine was free from gas. The plaintiff, not knowing the contrary, could rely upon the representation. *Gowen v. Bush* (C. C. A.) 76 Fed. 349. But there can be no reliance on the assurance where the plaintiff knows the danger. *Kenney v. Hingham Cordage Co.*, 168 Mass. 278.

obliged to construe the contract implied by law from the situation of the parties, and the terms of this contract are fixed by the subject-matter with which it deals. When the court finds that the danger which caused the injury arose from a condition of things existing at the time of the employment, and the character of the danger is such that an ordinarily prudent man would have known it, the court presumes that this plaintiff both knew and appreciated it, and, if it appears that he did not in fact know it, then he was, as a matter of law, guilty of contributory negligence in failing to inform himself.

“When the plaintiff entered the defendant’s service he impliedly agreed to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used. It is not material whether he examined the machinery before making the contract or not. He could look at it if he chose, or he could say: ‘I do not care to examine it. I will agree to work in this mill, and I am willing to take my risk in regard to that.’ In either case he would be held to contract with reference to the arrangement and kind of machinery then regularly in use by his employer, so far as these things were open and obvious, so that they could readily be ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage.”²⁰⁰ “The question in each case is not whether the employe has actually observed, and by a conscious act of the will assumed, all of the risks

²⁰⁰ *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153; *supra* § 92, note 187.

involved, but whether the risks are incident to and naturally grow out of the employment in which he is engaged, and are such as, taking his age, intelligence, and experience into account, he must be held to have appreciated if he saw, and such as, if he did not see, he could have seen and understood if he had looked. If the risks are of this character, then they are said to be obvious, and the employe assumes them."²⁰¹

The rule as to obvious dangers is to be applied only where the making of a contract for service is concerned,—either the original contract, or a new contract to work in other departments or perform other services.²⁰² But it is the general rule in the United States that when a new danger, not existing when the plaintiff was hired, arises through the negligence of the master, and the servant, knowing and appreciating it, remains at work, he cannot, as a matter of law, recover.²⁰³ And it is believed that the weight of authority tends to determine the question of the plaintiff's knowledge and appreciation of the danger by the same rule that is applied to dangers obvious upon entering the employment, although the qualification that the plaintiff is entitled to rely upon the master's performing his duty, and is

²⁰¹ *Kenney v. Hingham Cordage Co.*, 168 Mass. 278, 282; *Goldthwaite v. Haverhill & G. St. Ry. Co.*, 160 Mass. 554. Danger is obvious and assumed when it is "of such a nature that it can be appreciated and understood by the servant as well as by the master, or by any one else" (*Lothrop v. Fitchburg R. Co.*, 150 Mass. 423, 425); "equally plain to one at all attentive" (*Valley Ry. Co. v. Keegan* (C. C. A.) 87 Fed. 849); "a visible and apparent defect" (*Linton Coal & Min. Co. v. Persons*, 11 Ind. App. 264). As to sufficient instructions, see *Barker v. Lawrence Mfg. Co.*, 176 Mass. 203.

²⁰² *Supra*, § 82; *infra*, § 102.

²⁰³ *Infra*, § 114.

not bound to examine materials furnished him with great care, must be borne in mind. Therefore, it has seemed more convenient to group together those cases, whether the cause of injury existed at the time of the employment or later, which required the court to rule upon the question of the plaintiff's knowledge, as inferred from the character of the danger which caused his injury.

"In determining the question of obviousness, every reasonable inference must be drawn in favor of the party against whom a peremptory instruction is requested."²⁰⁴

The obvious risk which is assumed must be the proximate cause of the accident, and although the elements of danger are apparent, yet if they are set in motion by the negligence of the master the plaintiff may recover. Thus, where it was obvious that the hammer of a pile driver, by reason of its construction, might fall, the plaintiff could nevertheless recover where the cause of its falling was the negligent act of a drunken fellow servant for whom the master was responsible.²⁰⁵

Common knowledge.

Every person is presumed to know the facts of common every-day experience, and the court takes judicial notice of such common knowledge.²⁰⁶ When, therefore,

²⁰⁴ *Felton v. Girardy* (C. C. A.) 104 Fed. 127, 131.

²⁰⁵ *McPhee v. Scully*, 163 Mass. 216.

²⁰⁶ See *infra*, § 98. The court has said that the following were matters of common knowledge: "Even a boy must know, we think, that green hands are liable to do things which experienced hands would not," *Sullivan v. Lally*, 166 Mass. 265, 267. That street cars, or steam cars, jolt, *McCauley v. Springfield St. Ry. Co.*, 169 Mass.

the risk arises from a condition of things which common experience recognizes as dangerous, the plaintiff is presumed to know and appreciate the danger, and cannot be heard to deny it or offer evidence upon the subject. Thus, where a plaintiff, to support his allegation of negligence, proposed to appeal to the common knowledge of the jury that the failure to use a guy rope in certain circumstances, whereby he was injured, was gross carelessness, the court said: "If the necessity of using a guy rope in circumstances like those which existed at the time of the accident was a matter of common knowledge, or 'presumed to be within the experience of all men of common education moving in the ordinary walks of life,' then the plaintiff, from that com-

301; *Leary v. Boston & A. R. Co.*, 139 Mass. 580; *Southern Pac. Co. v. Johnson* (C. C. A.) 69 Fed. 559; *Louisville & N. R. Co. v. Bisch*, 120 Ind. 549; *Louisville & N. R. Co. v. Smith* (Ala.) 30 South. 571. Jumping off engine in motion is dangerous, *Leary v. Boston & A. R. Co.*, 139 Mass. 580. Getting body outside line of moving train is dangerous, *Thain v. Old Colony R. Co.*, 161 Mass. 353. "The swing of a street car passing over a curve is something which is so obvious that no one employed about such cars can be permitted to claim ignorance of it," *Goldthwait v. Haverhill & G. St. Ry. Co.*, 160 Mass. 554. That insulation may come off electric wires, *Chisholm v. New England T. & T. Co.*, 176 Mass. 125. That uncovered cogwheels are dangerous, *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152; *Ruchinsky v. French*, 168 Mass. 68. That glass will break, *Myers v. W. C. De Pauw Co.*, 138 Ind. 590. That, when a bank is undermined, it will fall, *Griffin v. Ohio & M. Ry. Co.*, 124 Ind. 326. That power may be so applied to a hand crank slipped on a shaft that it will stay on or work off, *Standard Oil Co. v. Helmick*, 148 Ind. 457. That unblocked frogs are dangerous, *Sheets v. Chicago & I. C. Ry. Co.*, 139 Ind. 682. That factories have trap doors, *Moore v. Ross*, 17 Rettle, Ct. Sess. Cas. (4th Ser.) 796. The law of gravitation, *Thompson v. Chicago, M. & St. P. Ry. Co.*, 14 Fed. 564. That iron wheels sliver, *McCain v. Chicago, B. & Q. R. Co.* (C. C. A.) 76 Fed. 125. See, also, *infra*, § 119.

mon experience, must have understood and appreciated the danger."²⁰⁷ So, upon a like contention it was said: "If, however, it be assumed that the inflammability of dust [in a fertilizer factory, ignited by superintendent's lantern] was a matter of common knowledge, it is difficult to see why the plaintiff did not know as much about it as any one."²⁰⁸

Where an expert was asked whether the danger of having a hand drawn under knives would be obvious to an inexperienced operative, it was held that the question was inadmissible. "In learning what the danger was, the jury may have been aided by the opinion of those who had special knowledge in regard to it; but, having found that, the question whether it was obvious to the common mind, or required a special education and experience to see and appreciate it, was addressed to the common knowledge of the jury, and not to the special knowledge of an expert."²⁰⁹

Obvious to one of the plaintiff's capacity.

The plaintiff is presumed to possess ordinary intelligence, and to exercise care to discover what such intelligence would enable him to know and appreciate. And as he is required to apply this grade of intelligence to the investigation of the risks of the employment which he undertakes, so he is required to draw upon whatever of special knowledge or experience he may have. Dangers that would not be heeded by persons unused to fac-

²⁰⁷ *De Lisle v. Ward*, 168 Mass. 579, 580.

²⁰⁸ *O'Reilly v. Bowker Fertilizer Co.*, 174 Mass. 202, 204.

²⁰⁹ *Gilbert v. Guild*, 144 Mass. 601, 605; *Connelly v. Hamilton Woolen Co.*, 163 Mass. 156. See, also, *Flynn v. Boston Electric Light Co.*, 171 Mass. 395.

tories would become apparent to one who had years of experience in different shops, and so dangers of machinery that might not be apparent to him may be obvious to a skilled mechanic or engineer. Each, according to the degree of skill, experience, or knowledge in the business he possesses, must exercise due care to discover what dangers surround him. As the servant is held to assume the risks of dangers, whatever their character may be, that he actually knows, so he is held to assume the risks which his experience teaches him to look for and expect; and these are as obvious to him as less hidden dangers are to those who profess no special information, and have only such knowledge and experience as the ordinary man must be presumed to possess. Due care is required of each, and that must be measured by the circumstances, one of which is the servant's knowledge. Several of the courts have expressed this by a presumption of fact that the servant possesses the knowledge and skill requisite for the performance of the service he seeks, and therefore, unless the contrary appears, canvass less thoroughly the plaintiff's previous training.²¹⁰ It is necessary, therefore, in determining whether the risk causing the injury was one which the plaintiff impliedly agreed to assume, to consider not only whether it was obvious to a man of common understanding, but also whether it was obvious to this plaintiff, as his capacity to know and appreciate appears in evidence, exercising due care to observe.

When the ordinary capacity and intelligence of the plaintiff is not in doubt, it is clear that evidence that he did not know a danger which he could have seen and

²¹⁰ *Infra*, § 98.

appreciated had he looked will not avail him, since it in effect declares that he was guilty of negligence in failing to notice it. But when a man experienced in the business testifies that he did not know the risk, the court cannot as readily say he could have seen it had he looked, and the jury must decide the conflict of fact and inference.

When the case is decided by the court, the holding necessarily is that the danger was obvious to the plaintiff, and that there was consequently no duty to warn or negligence on the part of the defendant. When the case is submitted to the jury, the ruling of the court is that, on the facts, the risk may or may not have been obvious to the plaintiff, and, if the jury shall find that it was not obvious, they are to determine whether the defendant has been guilty of negligence in failing to instruct the plaintiff, or warn him against it. Thus, it has been thought more convenient as well as more accurate to group the cases below under general headings, without distinguishing whether the danger was obvious or latent, save as the addition of the word "court" shows that it was ruled, as a matter of law, that the risk was obvious and assumed.²¹¹

²¹¹ *Objects Near Track.*

The business of railroading requires that permanent visible structures, such as bridges, signal posts, gate posts, switches, and the like, should be placed near the track; that the platforms and roofs of stations, and that parallel tracks for the passage or storage of cars, should also be near the line of track. This, and the dangers arising from it, are incidental to the business. A passenger is held to know, as a matter of common experience, that it is dangerous to get his body beyond the line of a moving train, and such an act, as a matter of law, is negligent. But this rule is inapplicable to the case of an employee whose duty requires him to swing or lean

§ 96. Dangers obvious to minors.

A minor, like an adult, assumes the obvious risks of injury from the condition of the business in which he engages; and

out beyond the line of his train. If a servant is bound to expect such structures, he has also a right to assume that the master will not place them so near as to injure him while in the performance of his duty. That is as much as can be said in the case of a servant who, without previous experience, begins work on moving trains. But, in fact, structures are placed so near the track that they do cause injury, and a servant with previous experience, however slight it may be, knows it. But the fact that a servant of experience knows that there are structures, and that they are often dangerously near the track, and the fact that any one of them is visible, and its distance from the track easily determined, does not, as it might in other employments, charge him with notice of it when he enters the employment, and do away with the master's duty in regard to it. Ordinarily, the servant passes rapidly over long distances, and it is perhaps impossible and inconsistent with his duty to observe each particular structure. All that due care requires of him is to observe the usual distance—the line—of structures by which he passes. If he is a brakeman, due care would require him to notice the average or general height of bridges, or nearness of station roofs, or the general distance of signal posts, and the like. Having seen one, he may assume he has seen all. Whether this defendant builds nearer or farther from the track than other railroads is immaterial, for a person of experience would, in the exercise of care, notice that, when he chose to become a servant, and refuse employment if it were too dangerous. Because of the impracticability of observing the precise distance of each particular structure, he is held only to observe the general distance of the line of structures on the defendant's road. As to any new structure, or any particular structure in or beyond that line, the master owes him no duty. As to any structure existing or newly built within that line, the master owes him the duty of warning, unless the circumstances are such that the servant had actual knowledge of it, or his attention was so attracted to it that he must have known of it. It seems that there must be some slight experience to charge the servant with notice of the line of structures; but when he has that notice, the facts that he was injured while acting in the course of his duty, that he had never

those are obvious risks which a person of the plaintiff's apparent age, intelligence, and capacity would discover and appreciate by the exercise of ordinary care.

By accepting the employment, a minor, equally with an adult, assumes the risk of injury, not only from the

seen the particular structure, that he did not expect it, that it was dark, and he could not see it, even that, through decay or otherwise, it leaned somewhat nearer the track, do not permit him to recover. If, however, the particular structure is within the usual line, it would seem that it is a question of fact whether or not he had actual knowledge of it.

For cases where the plaintiff had actual knowledge, see *supra*, § 93. *Hall v. Wakefield & S. St. Ry. Co.*, 178 Mass. 98 (Court: Tree near electric-car track); *Ryan v. New York, N. H. & H. R. Co.*, 169 Mass. 267 (Court: Brakeman descending car at night struck a fence three feet nine and one-half inches from track; fence old, and leaned towards track; had always been passed at night, and never on the siding next the fence. Held a permanent visible structure, not near enough track to constitute an unusual risk; plaintiff had opportunity enough to learn of it); *Vining v. New York & N. E. R. Co.*, 167 Mass. 539 (Court: Brakeman of experience struck box car on side track. Plaintiff "did not think of looking"); *Content v. New York, N. H. & H. R. Co.*, 165 Mass. 267 (Court: Brakeman going down side ladder at night struck by box car on siding, wider than ordinary box cars. He knew of these cars); *Austin v. Boston & M. R. R.*, 164 Mass. 282 (Court: Brakeman struck at night by gate post four feet from track, but slightly sagging towards it. Similar structures were equally near, and plaintiff had passed over the road for two years daily); *Goodes v. Boston & A. R. Co.*, 162 Mass. 287 (Court: Brakeman of several months' experience on another road, and three months' on this road, had frequently, in daylight, been by switch, near track, which struck him); *Thain v. Old Colony R. Co.*, 161 Mass. 353 (Court: Engineer struck by post temporarily erected a few days before; had been past it, and was experienced; he knew of similar structures at that distance, therefore assumed); *Coombs v. Fitchburg R. Co.*, 156 Mass. 200 (Court: Brakeman employed several months, during which he had learned of switch, and of making flying switches, took risk of switch being near track); *Lovejoy v. Boston & L. R. Corp.*, 125 Mass. 79 (Court: Engineer struck by

negligence of fellow servants and dangers incidental to the business, but also from the existing condition of

signal post three feet eight inches from track, while he was leaning from cab to get a signal); *Scanlon v. Boston & A. R. Co.*, 147 Mass. 484 (Jury: Brakeman one day in service, and without previous experience or knowledge of the road, while ascending car, struck by signal post three and one-half feet from track; there were very few erections so near, and he had no reason to know of any of them); *Ferren v. Old Colony R. Co.*, 143 Mass. 197 (Jury: A blacksmith was sometimes called upon to aid in moving cars. The track, being near the building, gradually approached it, so that at the corner there was not space enough to get by between building and car. He had general knowledge of these facts, but did not know about the narrowness of the space, and had never pushed a car so far. It was a question for the jury whether he appreciated the risk); *Dacey v. New York, N. H. & H. R. Co.*, 168 Mass. 479 (Court: Brakeman probably struck switch near track, but, as there was no evidence of how the accident happened, or of his due care, no recovery); *Pennsylvania Co. v. Finney*, 145 Ind. 551 (Court: Water crane, by which plaintiff had often passed); *New York, C. & St. L. R. Co. v. Ostman*, 146 Ind. 452 (Court: Cattle shute struck plaintiff as he leaned out for signals. Rules required him to look out for such things, and he had been over road); *Indiana, I. & I. R. Co. v. Bundy*, 152 Ind. 590 (Jury: Had often passed by wire locking device which tripped him at night); *Chicago & E. I. R. Co. v. Richards* (Ind. App.) 61 N. E. 18 (Jury: Car on side track); *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300 (Jury: Stone in wall); *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240 (Jury: Car placed too near switch on parallel track); *McNamara v. Logan*, 100 Ala. 187 (Jury: Narrowness of entry where track passed); *North Birmingham St. R. Co. v. Wright* (Ala.) 30 South. 360 (Court: Pole near electric-car track). See *Wilson v. Louisville & N. R. Co.*, 85 Ala. 269 (Court); *Hale v. Union Pac. Ry. Co.*, 16 Fed. 744 (Jury: Telegraph pole twelve inches from track); *Anglin v. Texas & Pac. Ry. Co.* (C. C. A.) 60 Fed. 553 (Court: Engine on parallel track); *Oregon Short Line & U. N. Ry. Co. v. Tracy* (C. C. A.) 66 Fed. 931 (Jury: Brush overhanging track, a temporary condition).

Low Bridges.

Pennsylvania Co. v. Sears, 136 Ind. 460 (Jury: No opportunity to see it); *Baltimore & O. & C. R. Co. v. Rowan*, 104 Ind. 88 (Jury: (440)

affairs which he is competent to appreciate, and the dangers of which he may avoid.²¹²

No actual knowledge); *Louisville, N. A. & C. Ry. Co. v. Wright*, 115 Ind. 378 (Jury: Brakeman experienced, and had often been under bridge, not obliged to search for these dangers); *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 91 Ala. 112 (Jury: Servant must use his senses, though entitled to warning of the defect); *Schlaff v. Louisville & N. R. Co.*, 100 Ala. 377 (Court: Daily travel gives knowledge); *Louisville & N. R. Co. v. Banks*, 104 Ala. 508 (Court: Warning had been given); *Goff's Adm'r v. Norfolk & W. R. Co.*, 36 Fed. 299 (Court: Knew that there were bridges); *Northern Pac. R. Co. v. Mortenson (C. C. A.)* 63 Fed. 530 (Jury: Standing on higher car); *Myers v. Chicago, St. P., M. & O. Ry. Co. (C. C. A.)* 95 Fed. 406 (Court: Had passed under it fifty times); *Dalton v. Receivers*, 4 Hughes, 180, Fed. Cas. No. 3,550 (Court: Plaintiff had often passed under wire across track); *Riley v. Connecticut River R. Co.*, 135 Mass. 292 (Court: No evidence of due care).

Tracks.

Union Pac. Ry. Co. v. O'Brien, 161 U. S. 451 (Jury: Absence of culvert permitting sand on track); *Southerland v. Northern Pac. R. Co.*, 43 Fed. 646 (Jury: Pile of ashes); *Davidson v. Southern Pac. Co.*, 44 Fed. 476 (Court: Drain); *Cincinnati, N. O. & T. P. Ry. Co. v. Mealer (C. C. A.)* 50 Fed. 725 (Court: Piece of coke); *Little Rock & M. R. Co. v. Moseley (C. C. A.)* 56 Fed. 1009 (Jury: Space between cross ties not filled with earth); *Northern Pac. R. Co. v. Teeter (C. C. A.)* 63 Fed. 527 (Jury: Hole covered with snow); *Valley Ry. Co. v. Keegan (C. C. A.)* 87 Fed. 849 (Jury: Hole in planking between rails); *Chicago G. W. Ry. Co. v. Price (C. C. A.)* 97 Fed. 423 (Jury: Unevenness); *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478 (Court: Adjacent track); *Gleason v. New York & N. E. R. Co.*, 159 Mass. 68 (Court: Hole in planks near switch caught switchman); *Louisville & N. R. Co. v. Kemper*, 147 Ind. 561, 153 Ind. 618 (Jury: Leakage of water); *Pennsylvania Co. v. Brush*, 130 Ind. 347 (Jury: Defective tie); *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168 (Jury: Sliver in rail); *O'Neal v. Chi-*

²¹² *King v. Boston & W. R. Corp.*, 9 Cush. (Mass.) 112; *Taylor v. Wootan*, 1 Ind. App. 188; *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151; *McNamara v. Logan*, 100 Ala. 187. See, also, *supra*, § 82.

As to the knowledge which a minor in fact possesses, and as to the presumption that he will use reasonable

chicago & I. C. Ry. Co., 132 Ind. 110 (Court: Jolting of train on uneven track); Louisville, E. & St. L. C. R. Co. v. Miller, 140 Ind. 685 (Jury: Defects in completed track); Pennsylvania Co. v. Ebaugh, 152 Ind. 531 (Jury: Defects in completed track); Evansville & R. R. Co. v. Doan, 3 Ind. App. 453 (Court: Track in process of construction); Louisville & N. R. Co. v. Stutts, 105 Ala. 368 (Court: High trestle).

Unblocked Frogs, etc.

Lake Shore & M. S. Ry. Co. v. McCormick, 74 Ind. 440 (Court); Sheets v. Chicago & I. C. Ry. Co., 139 Ind. 682 (Court); Wabash R. Co. v. Ray, 152 Ind. 392 (Court: Guard rail); Ames v. Lake Shore & M. S. Ry. Co., 135 Ind. 363 (Unblocked switch); Chicago & E. R. Co. v. Lee, 17 Ind. App. 215 (Unboxed signal wires); Indiana, I. & I. R. Co. v. Bundy, 152 Ind. 590 (Jury: Wire on switch-locking device); Southern Pac. Co. v. Seley, 152 U. S. 145 (Court).

Methods of Operation.

Sullivan v. Fitchburg R. Co., 161 Mass. 125 (Court: Track men to look out for wild trains); Maher v. Boston & A. R. Co., 158 Mass. 36 (Court: Placing higher cars at end of train); Lake Shore & M. S. Ry. Co. v. Malcom, 12 Ind. App. 612 (Method of running gravel train); Larkin v. New York Cent. & H. R. R. Co., 166 Mass. 110 (Court: Way car is loaded); Hunt v. Hurd (C. C. A.) 98 Fed. 683 (Court: Flying switch); Texas & P. Ry. Co. v. Minnick (C. C. A.) 57 Fed. 362, 61 Fed. 635 (Jury: Absence of track walker).

Switches.

Naylor v. New York Cent. & H. R. R. Co., 33 Fed. 801 (Court: Color of target); Peirce v. Clarin (C. C. A.) 82 Fed. 550 (Jury).

Drawbars and Deadwoods.

Kohn v. McNulta, 147 U. S. 238 (Court: Absence of deadwoods); Pittsburgh & W. Ry. Co. v. Thompson (C. C. A.) 82 Fed. 720 (Jury: Drawhead); Brooks v. Northern Pac. R. Co., 47 Fed. 687 (Court: Switch engine); Whitcomb v. Standard Oil Co., 153 Ind. 513 (Court: Difference in height); Louisville & N. R. Co. v. Boland, 96 Ala. 626 (Court: Difference in height of couplings); Boland v. Louisville & N. R. Co., 106 Ala. 641 (Court: Difference in height of couplings); East Tennessee, V. & G. Ry. Co. v. Turvaville, 97 Ala. 122 (Court: Difference in height of couplings).

Brakes.

Northern Pac. R. Co. v. Herbert, 116 U. S. 642 (Jury); Central (442)

care to inform himself, he stands in no better condition than an adult. Boys of twelve and fourteen years are

Trust Co. v. Texas & St. L. Ry. Co., 32 Fed. 448 (Jury); Baltimore & O. & C. R. Co. v. Leathers, 12 Ind. App. 544 (Jury); Ohio & M. Ry. Co. v. Percy, 128 Ind. 197 (Jury); Chicago, St. L. & P. R. Co. v. Fry, 131 Ind. 319 (Jury).

Defects in Engines and Cars.

Wabash & W. Ry. Co. v. Morgan, 132 Ind. 430 (Jury: Defective engine); Evansville & T. H. R. Co. v. Duel, 134 Ind. 156 (Jury: Defective engine); Kentucky & Indiana Bridge Co. v. Eastman, 7 Ind. App. 514 (Jury: Defective gate on car); Chicago & E. R. Co. v. Branyan, 10 Ind. App. 570 (Jury: Rotten floor); Texas & P. Ry. Co. v. Minnick (C. C. A.) 57 Fed. 362, 61 Fed. 635 (Jury: Engine throwing sparks); Cassady v. Boston & A. R. Co., 164 Mass. 168 (Court: Door, that plaintiff had hooked up, fell); Denver Tramway Co. v. Nesbit, 22 Colo. 408 (Court: Absence of life guard on street car); Louisville, N. A. & C. Ry. Co. v. Berkey, 136 Ind. 181 (Jury: Defective coupling pin).

Absence of Light is Obvious.

Carrigan v. Washburn & M. Mfg. Co., 170 Mass. 79 (Court); Kelley v. Calumet Woolen Co., 177 Mass. 128 (Court); Malone v. Western Transp. Co., 5 Biss. 315, Fed. Cas. No. 8,996 (Court); Gulf, C. & S. F. Ry. Co. v. Jackson (C. C. A.) 65 Fed. 48 (Court); Red River Line v. Smith (C. C. A.) 99 Fed. 520 (Court). See, also, Wilkinson v. Fairrie, 1 Hurl. & C. 633; Seymour v. Maddox, 16 Q. B. Div. 326; Robertson v. Adamson, 24 Rettie, Ct. Sess. Cas. (2d Ser.) 1231; Kaare v. Troy Steel & Iron Co., 139 N. Y. 369.

Condition of Floors.

Kleinst v. Kunhardt, 160 Mass. 230 (Court: Wet and slippery); Murphey v. American Rubber Co., 159 Mass. 266 (Court: Wet and slippery); Feely v. Pearson Cordage Co., 161 Mass. 426 (Court: Wet and slippery); see Thompson v. Norman Paper Co., 169 Mass. 416; Hathaway v. Atlanta Steel Co., 155 Ind. 507; Nealand v. Lynn & B. R. Co., 173 Mass. 42 (Court: Uneven floor); Houlihan v. Connecticut River R. Co., 164 Mass. 555 (Jury: Defective plank in trestle); De Pauw Co. v. Stubblefield, 132 Ind. 182 (Jury: Floor over pit gave way); Huddleston v. Lowell Machine Shop, 106 Mass. 282 (Jury: Rotten flooring).

Trap Doors.

Hogarth v. Pocasset Mfg. Co., 167 Mass. 225 (Jury: Flush with

charged with the knowledge that cogwheels and revolving rollers will cause them injury unless it appears that

floor, and seldom used). Compare *Young v. Miller*, 167 Mass. 224 (Court); *Johnson v. Field-Thurber Co.*, 171 Mass. 481 (Jury); *Dolphin v. Plumley*, 167 Mass. 167, 175 Mass. 304 (Jury: Movable platform).

Elevator and Other Openings.

Thomas v. Quartermaine, 18 Q. B. Div. 685 (Court: Unguarded vats); *Carrigan v. Washburn & M. Mfg. Co.*, 170 Mass. 79 (Court: Unguarded vats); *Keenan v. Edison E. L. Co.*, 159 Mass. 379 (Court: Unguarded elevator); *Connors v. Morton*, 160 Mass. 333 (Jury: Whether negligent to set plaintiff to work near elevator); *Hoard v. Blackstone Mfg. Co.*, 177 Mass. 69 (Court: Elevator hole); *Whalen v. Whitcomb*, 178 Mass. 33 (Court: Depression in floor); *McFarland v. The J. C. Tuthill*, 37 Fed. 714 (Jury: Defective grating); *Craig v. The Saratoga*, 87 Fed. 349 (Court: Hatch); *Nyback v. Champagne Lumber Co. (C. C. A.)* 109 Fed. 732 (Jury: Unguarded opening in floor of saw mill); *Muncie Pulp Co. v. Jones*, 11 Ind. App. 110 (Jury: Hole, over which canvas stretched, and plaintiff laid planks).

Unrailed Platforms, etc.

Moulton v. Gage, 138 Mass. 390 (Court); *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135 (Court).

Falling Substances in Mines.

Parke County Coal Co. v. Barth, 5 Ind. App. 159; *New Kentucky Coal Co. v. Albani*, 12 Ind. App. 497; *Linton Coal & Mining Co. v. Persons*, 11 Ind. App. 264; *Union Pac. Ry. Co. v. Jarvi (C. C. A.)* 53 Fed. 65; *Harder & Haffer Coal Min. Co. v. Schmidt (C. C. A.)* 104 Fed. 282; *Stiles v. Richie*, 8 Colo. App. 393 (Court: Earth from side); *Louisville, N. A. & C. Ry. Co. v. Quinn*, 14 Ind. App. 554 (Court: Method of supporting roof).

Trench.

Liability of side of trench to cave from the character of the soil, etc., not as a matter of law, obvious. *Breen v. Field*, 157 Mass. 277, 159 Mass. 582; *Coan v. City of Marlborough*, 164 Mass. 206; *Norton v. City of New Bedford*, 166 Mass. 48; *McKee v. Tourtellotte*, 167 Mass. 69; *City of Fort Wayne v. Christie*, 156 Ind. 172; *City of Fort Wayne v. Patterson*, 25 Ind. App. 548; *Foster v. City of Greeley (Colo. App.)* 61 Pac. 482; *Town of Colorado City v. Liafe (Colo.)* 65 Pac. 630. Where plaintiff and defendant are equally able to observe, (444)

there was some peculiar risk, or that the boy was below the average intelligence. When less apparent dangers

it is assumed. *Hughes v. Malden & Melrose Gas Light Co.*, 168 Mass. 395 (Court); *Vincennes Water Supply Co. v. White*, 124 Ind. 376 (Court); *City of Lebanon v. McCoy*, 12 Ind. App. 500 (Jury: Careless bracing).

Undermined Bank, etc., Falling.

O'Driscoll v. Faxon, 156 Mass. 527 (Jury: Inadequate protection); *Lynch v. Allyn*, 160 Mass. 248 (Jury); *Swanson v. City of Lafayette*, 134 Ind. 625 (Court: Gravel bank); *Thompson v. Chicago, M. & St. P. Ry. Co.*, 14 Fed. 564 (Jury); *Thomas v. Ross (C. C. A.)* 75 Fed. 552 (Jury: Loosened by rain); *Anderson v. Winston*, 31 Fed. 528 (Jury: Crack caused by blast); *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71 (Jury: Rock split by blast); *Collins v. Inhabitants of Greenfield*, 172 Mass. 78 (Jury: Rock split by blast); *Ryan v. Tarbox*, 135 Mass. 207 (Jury: Wall liable to fall).

Dynamite and Blasting.

Dean v. Smith, 169 Mass. 569 (Jury: Missed shot); *Holy Cross Gold Min. Co. v. O'Sullivan*, 27 Colo. 237 (Jury: Missed shot); *Eureka Co. v. Bass*, 81 Ala. 201 (Jury: Danger of explosion); *Mather v. Rillston*, 156 U. S. 391 (Jury: Having nothing to do with blasting, plaintiff hurt by powder stored in engine house); *Burke v. Anderson (C. C. A.)* 69 Fed. 814 (Jury: Dynamite in ground where plaintiff set at work); *King v. Morgan (C. C. A.)* 109 Fed. 446 (Court: Using iron tamping bar); *Eureka Block Coal Co. v. Wells (Ind. App.)* 61 N. E. 236.

Other Explosives.

O'Reilly v. Bowker Fertilizer Co., 174 Mass. 202 (Jury: Inflammability of fertilizer dust); *Redmond v. Butler*, 168 Mass. 367 (Jury: Pouring damp into molten lead); *Lyons v. Boston Towage & Lighterage Co.*, 163 Mass. 158 (Court: Explosion of varnish); *Holland v. Tennessee C., I. & R. Co.*, 91 Ala. 444 (Jury: Molten iron exploded in trench); *McGowan v. La Plata Mining & Smelting Co.*, 9 Fed. 861 (Jury: Hot slag exploding in water); *Gowen v. Bush (C. C. A.)* 76 Fed. 349 (Jury: Gas in mine exploded); *Fuller v. New York, N. H. & H. R. Co.*, 175 Mass. 424 (Court: Pressure of steam exploding glass tube on boiler obvious to experienced engineer).

Materials for Work.

Consolidated Stone Co. v. Summit, 152 Ind. 297 (Jury: Seam in rock raised by derrick).

cause his injury, the court does not, in the face of testimony that he was not warned or instructed concerning them, readily presume his knowledge, unless he is of such

Methods of Work.

Flaherty v. Norwood Engineering Co., 172 Mass. 134 (Jury: Method of turning ladle of molten iron); La Belle v. Inhabitants of Montague, 174 Mass. 453 (Court: Placing hand under stone lowered by derrick); Flynn v. Campbell, 160 Mass. 128 (Dumping coal); Wilson v. Tremont & Suffolk Mills, 159 Mass. 154 (Court: Standing on machine to reach up); Everhard v. Diamond Match Co., 98 Fed. 555 (Court: Standing on machine to reach up).

Piling of Lumber, etc.

Millard v. West End St. Ry. Co., 173 Mass. 512 (Jury: Carelessly piled lumber); Romona Oolitic Stone Co. v. Tate, 12 Ind. App. 57 (Jury: Carelessly piled iron frames); Cazolan v. Southern Pac. Co., 84 Fed. 84 (Court: Piling of freight boxes); Diamond Plate Glass Co. v. De Hority, 143 Ind. 381 (Court: Panel resting against fence blown over by wind).

Dangers in Place of Work.

Olsen v. Andrews, 168 Mass. 261 (Court: Crossing tracks in order to reach work); Bethlehem Iron Co. v. Weiss (C. C. A.) 100 Fed. 45 (Jury: Crossing tracks in course of work); McGuirk v. Shattuck, 160 Mass. 45 (Court: Riding in chair placed in wagon); Volk v. Sturtevant Co. (C. C. A.) 104 Fed. 276 (Court: Sweeping bottom of elevator shaft); The Luckenbach, 53 Fed. 662 (Court: Door swinging when vessel lurched); May v. Whittier Mach. Co., 154 Mass. 29 (Court: Narrow passageway, and plaintiff stumbled against machine); Whelton v. West End St. Ry. Co., 172 Mass. 555 (Court: Conductor tripped on projecting rail); Haley v. Case, 142 Mass. 316 (Jury: Teamster backing under low sign); Murch v. Wilson's Sons & Co., 168 Mass. 408 (Court: Patent fuel in chart room stove).

Appliances.

Williams v. Clough, 3 Hurl. & N. 258 (Jury: Ladder); Gibson v. Sullivan, 164 Mass. 557 (Jury: Terra cotta brackets not properly fastened); Jones v. Pacific Mills, 176 Mass. 354 (Jury: Spliced ladder); Littlefield v. Edward P. Allis Co., 177 Mass. 151 (Jury: Directed to use piping to drive in bolt, and splinter flew off); Baltimore & O. S. W. R. Co. v. Amos, 20 Ind. App. 378 (Jury: Hammer); Rietman v. Stolte, 120 Ind. 314 (Court: Hooks to raise tim-
(446)

an age that he is fairly to be considered an adult. The age of the minor is important.²¹³

ber); American Dredging Co. v. Walls (C. C. A.) 84 Fed. 428 (Court: Absence of cleats); Hunt v. Kile (C. C. A.) 98 Fed. 49 (Jury: Rope); Cunard S. S. Co. v. Carey, 119 U. S. 245 (Jury: Rope); Barnard v. Schraft, 168 Mass. 211 (Court: New kettles did not fit furnace).

When appliances are selected from a stock furnished by the master, servant takes the risk that he or another may select a defective one. Maloney v. United States Rubber Co., 169 Mass. 347 (Court: Joist); Ellsbury v. New York, N. H. & H. R. Co., 172 Mass. 130 (Court: Car link); Pitman v. Bennett (Feb. 25, 1882) 72 Law T. 299 (Court).

Starting of Machinery.

Where machine started by belt slipping from loose to tight pulley, which might happen, though a contrivance could be used to prevent it, there is no breach of duty. Ross v. Pearson Cordage Co., 164 Mass. 257 (Court). But see Donahue v. Drown, 154 Mass. 21; Mooney v. Connecticut River Lumber Co., 154 Mass. 407; Connors v. Durite Mfg. Co., 156 Mass. 163; Pennsylvania Co. v. Witte, 15 Ind. App. 583.

Dangerous or Defective Machinery.

Anderson v. Clark, 155 Mass. 368 (Court: Windlass); Cunningham v. Lynn & B. St. Ry. Co., 170 Mass. 298 (Court: Windlass); Salem Stone & Lime Co. v. Tepps, 10 Ind. App. 516 (Jury: Defective leg of drill); Gaar, Scott & Co. v. Willson, 21 Ind. App. 91 (Jury:

²¹³ See cases cited supra, §§ 90, 91, 93-95.

Cog Wheels.

Downey v. Sawyer, 157 Mass. 418 (Court: Boy of sixteen knew that, when putting on belt, there was danger of getting caught in gears of adjoining machine); Coombs v. New Bedford Cordage Co., 102 Mass. 572 (For jury: Boy of fourteen, unfamiliar with machinery, at work for one day for first time at a task requiring close attention, caught in gears of adjoining machine); Sullivan v. India Mfg. Co., 113 Mass. 396 (For jury: Boy of fourteen, attempting to pass through narrow way, had sleeve caught in cogs); Ciriack v. Merchants' Woolen Co., 146 Mass. 182 (Court: Boy of twelve, sent on an errand between machines, caught in cogs); Ciriack v. Merchants' Woolen Co., 151 Mass. 152 (For jury, on second trial, as it appeared that boy was of less than average in-

§ 97. *Extent of knowledge.*

Where the general danger is known or ought to be known

Bracket to hold weight fell); *Dolan v. Atwater*, 167 Mass. 279; (Court: Loose latch on coal tub); *Smith v. Beaudry*, 175 Mass. 286 (Court: Grindstone too far above tool rest); *Myers v. Hudson Iron Co.*, 150 Mass. 125 (Jury: Brake unable to hold bucket in mine); *Prendible v. Connecticut River Mfg. Co.*, 160 Mass. 131 (Jury: Load on staging pulling out cleats); *Sullivan v. Thorndike Co.*, 175 Mass. 41 (Jury: Rope of overloaded elevator slipping); *La Fortune v. Jolly*, 167 Mass. 170 (Jury: Door of boiler blowing open when fire lighted); *French v. Columbia Spinning Co.*, 169 Mass. 531 (Court: Platform in front of machine liable to tip); *Henderson v. Boynton*, 173 Mass. 217 (Court: Platform in front of machine liable to tip); *Spaulding v. Forbes Lithograph Mfg. Co.*, 171 Mass. 271 (Jury: Seat of machine, by reason of its construction, tipped when used as directed); *Slattery v. Walker & Pratt Mfg. Co. (Mass.)* 60 N. E. 782 (Jury: New and improper check valve on air hoist).

Set Screws.

Goodnow v. Walpole Emery Mills, 146 Mass. 261 (Court: Stepped back and was caught); *Rooney v. Sewall & Day Cordage Co.*, 161

telligence, and that defendant knew, or from his appearance ought to have known, of it); *Probert v. Phipps*, 149 Mass. 258 (Court: Boy of fifteen, trying to stop a machine in a narrow passageway, the danger of which he knew, was caught in gears of adjoining machine); *McGuerty v. Hale*, 161 Mass. 51 (Court: Boy of eighteen, caught in gears of his machine through negligence of fellow servant, either in not ventilating room, whereby he became dizzy, or because wedges became loose, which he leaned over and tried to fix); *Cheney v. Middlesex Co.*, 161 Mass. 296 (Court: Boy of eighteen, walking through passageway, heard a cry, turned quickly, and thrust his hand in gears); *Silvia v. Sagamore Mfg. Co.*, 177 Mass. 476 (Court: Boy over fourteen); *E. S. Higgins Carpet Co. v. O'Keefe (C. C. A.)* 79 Fed. 900 (Court: Boy of fifteen).

Set Screws and Keyways.

Hale v. Cheney, 159 Mass. 268 (Court: Boy of sixteen, intelligent, but not careful about machinery, had worked about shop, and part of time on machine, the shafting of which contained a set screw. In passing by, his trousers were caught); *Demers v. Marshall*, 172 (448)

to the servant, particular details which merely enhance the danger need not be known.

“The general rule undoubtedly is that a person can-

Mass. 153 (Court: Taking new way by machine just operated); Donahue v. Washburn & Moen Mfg. Co., 169 Mass. 574 (Court: Had to reach in to cut wire); Ford v. Mount Tom Sulphite Pulp Co., 172 Mass. 544 (Court: Had been newly put in); Demers v. Marshall, 178 Mass. 9 (Court: Caught while oiling shaft); Wabash Paper Co. v. Webb, 146 Ind. 303 (Court); Keats v. National Heeling Mach. Co. (C. C. A.) 65 Fed. 940 (Court); Taylor-Craig Corp. v. Hage (C. C. A.) 69 Fed. 581 (Jury); Cushman v. Cushman (Mass.) 61 N. E. 262 (Court: Removing belt).

Cogs and Gearing.

Foley v. Pettee Mach. Works, 149 Mass. 294 (Court); Goodridge

Mass. 548 (Court: Boy of eighteen caught by set screw on shaft while oiling machine).

Circular Saws.

Hanson v. Ludlow Mfg. Co., 162 Mass. 187 (Jury: Boy of seventeen, sawing blocks, left, with the approval of his foreman, several on table at back of saw, and one, being caught by teeth, drew his hand against saw); Wilson v. Steel Edge Stamping & Retinning Co., 163 Mass. 315 (Court: Boy of twenty, having previously run circular saw, though not an experienced hand, set to work, and fed blocks with hand, though knowing a safer way); Buttle v. George G. Page Box Co., 175 Mass. 318 (Court: Boy of eighteen trying to oil hand saw, which he had done before); Jarvis v. Coes Wrench Co., 177 Mass. 170 (For jury: Boy of fifteen, knowing danger of circular saw, but not that wood might bound back, was injured).

Revolving Rollers or Cylinders.

O'Connor v. Adams, 120 Mass. 427 (For jury: Boy of twenty, unfamiliar with machinery, set to clean cylinders, the inner one of which revolved rapidly, and could not well be seen); Rock v. Indian Orchard Mills, 142 Mass. 522 (Jury: Boy of thirteen caught in a winder); Crowley v. Pacific Mills, 148 Mass. 228 (Court: Boy of seventeen, employed previously on a similar machine, caught his finger between roll and hot cylinder while attempting to smooth cloth); Pratt v. Prouty, 153 Mass. 333 (Court: Boy of sixteen, told not to get his fingers between two slowly-revolving rollers, did so); Tinkham v. Sawyer, 153 Mass. 485 (Court: Boy of sixteen, at work

not be said to take a risk unless he knows not only the condition of things, but also that danger exists in such

v. Washington Mills Co., 160 Mass. 234 (Court: Pushed against them); Ruchinsky v. French, 168 Mass. 68 (Court: Obligated to pass hand by); Wilson v. Massachusetts Cotton Mills, 169 Mass. 67 (Court: Stuck in hand while attending to work); The Serapis, 49 Fed. 393, 51 Fed. 91 (Court); The Maharajah, 40 Fed. 784, 49 Fed. 111 (Court: Handle of winch came near); Townsend v. Langles, 41 Fed. 919 (Court: Brushing them off); Greer v. Turnbull & Co., 19 Rettie, Ct. Sess. Cas. (4th Ser.) 21 (Court: Plaintiff stumbled); Britton v. Great Western Cotton Co., L. R. 7 Exch. 130 (Jury: Failure to fence).

Revolving Rollers.

East Chicago Iron & Steel Co. v. Williams, 17 Ind. App. 573 (Jury: Defective billet rollers); Richstaia v. Washington Mills Co., 157

on "picker," knew machine was dangerous, and that floor was slippery); De Souza v. Stafford Mills, 155 Mass. 476 (Court: Boy of nineteen, of average intelligence, caught by putting his hand into cotton beater, while at rest, to clean out clogs); Patnode v. Warren Cotton Mills, 157 Mass. 283 (For jury: Boy of fourteen injured on lapwinder while helping the other operator; had never worked in mills, nor on this machine, and rather dull); O'Connor v. Whittall, 169 Mass. 563 (Court: Boy of sixteen, shown how to operate a feeder on picker machine, caught on rollers; that it might have been safer with guard is immaterial); Lowcock v. Franklin Paper Co., 169 Mass. 313 (Court: Boy of fifteen, having worked passing paper through revolving rollers, cannot recover if hand caught); Shine v. Cochecho Mfg. Co., 173 Mass. 558 (Court: Boy of seventeen, smoothing cloth as it passes through rollers, has hand caught in hole in cloth); Gilbert v. Guild, 144 Mass. 601 (Court: Boy of nineteen, working on machine which shears nap of cloth by revolving knives, unguarded); Sullivan v. Simplex Elec. Co., 178 Mass. 35 (Court: Boy of nineteen, caught in rollers. Telling him to push them in did not justify him in thinking his hand would not be caught); Grizzle v. Frost, 3 Fost. & F. 622 (Jury: Girl of fifteen putting hemp between moving rollers); Race v. Harrison, 9 Times Law R. 567 (Court: Boy of fifteen caught in moving machinery); Robertson v. Cornelson, 34 Fed. 716 (Jury: Boy of twelve cleaning moving machinery); Phillips v. Michaels, 11 Ind. App. 672 (Court: Girl of fifteen knows heated (450)

condition. If, however, the danger is obvious, knowledge of the condition of things need only be shown.”²¹⁴

Mass. 538 (Court: Cloth drew hand in); Daigle v. Lawrence Mfg. Co., 159 Mass. 378 (Court: Removing waste); Connolly v. Eldredge, 160 Mass. 566 (Court: Did not properly use guard); De Costa v. Hargraves Mills, 170 Mass. 375 (Jury: Ignorant person led to believe it safe to clean cotton beater while in motion); Robinska v. Lyman Mills, 174 Mass. 433 (Court: Removing waste from partly hidden roller); Bjbjian v. Woonsocket Rubber Co., 164 Mass. 214 (Jury: Distance between increased and improper warning).

Revolving Knives.

Guedelhofer v. Ernsting, 23 Ind. App. 188 (Court: Unguarded knives); Veginan v. Morse, 160 Mass. 143 (Jury: Man not regularly employed on planer, and could not see knives); Stuart v. West End St. Ry. Co., 163 Mass. 391 (Court: Feeding hay into cutter by hand); Gleason v. Smith, 172 Mass. 50 (Court: Insufficient guard

rollers); American Strawboard Co. v. Foust, 12 Ind. App. 421 (Jury: Boy on paper machine not told how to insert paper properly).

Revolving Knives.

Taylor v. Wootan, 1 Ind. App. 188 (Jury: Boy of twelve caught in planer); Bohn Mfg. Co. v. Erickson (C. C. A.) 55 Fed. 943 (Jury: Boy of fifteen, knowing of knives, might not know of suction); Blumenthal v. Craig (C. C. A.) 81 Fed. 320 (Jury: Boy caught by knives, guard of which had become broken).

Railroad Dangers.

Thompson v. Boston & M. R. R., 153 Mass. 391 (Court: Boy of eighteen swung from moving train and struck pile of rails); Worthington & Co. v. Goforth, 124 Ala. 656 (Court: Boy of sixteen climbed moving car to set brakes); Brazil Block Coal Co. v. Gaffney, 119 Ind. 455 (Jury: Boy of fifteen told to couple cars); Louisville, N. A. & C. Ry. Co. v. Frawley, 110 Ind. 18 (Jury: Boy of nineteen did not know greater danger of double than single deadwoods); Umbach v. Lake Shore & M. S. Ry. Co., 83 Ind. 191 (Court: Boy of nineteen knew of cars unsafe to couple); Louisville, E. & St. L. R. Co. v. Berry, 2 Ind. App. 427 (Jury: Boy of eighteen injured by boiler); Evansville & Richmond R. Co. v. Maddux, 134 Ind. 571 (Jury: Boy

²¹⁴ Anderson v. Clark, 155 Mass. 368, 370; Goldthwait v. Haverhill & G. St. Ry. Co., 160 Mass. 554.

Either the plaintiff must actually know of the danger, or the danger must be so apparent to one of his age, capacity, and experience that he must be presumed

over molding machine); *Medway v. Greenwich I. L. Co.*, 14 Times Law R. 291 (jury).

Similar Dangers.

Quigley v. Thomas G. Plant Co., 165 Mass. 368 (Court: Guard on dieing-out machine did not make it safer); *Carey v. Boston & M. R. R.*, 158 Mass. 228 (Court: Crank of handcar caught clothes).

Shafting.

Russell v. Tillotson, 140 Mass. 201 (Court: Ladder put too near); *Murphy v. American Rubber Co.*, 159 Mass. 266 (Court: Slipped on floor and caught); *Connelly v. Hamilton Woolen Co.*, 163 Mass. 156 (Court: Whitewashing room); *Lemoine v. Aldrich*, 177 Mass. 89 (Court: Low over doorway); *Pullman's Palace-Car Co. v. Harkins (C. C. A.)* 55 Fed. 932 (Jury: Smooth and rapidly revolving).

Belts and Pulleys.

Kenney v. Hingham Cordage Co., 168 Mass. 278 (Court: Narrow

does not know danger of unballasted track); *Evansville & Richmond R. Co. v. Henderson*, 134 Ind. 636 (Court: Boy of nineteen does know danger of uncompleted roadbed); *Pennsylvania Co. v. Congdon*, 134 Ind. 226 (Court: Sudden stop obvious to boy of eighteen); *Goff's Adm'r v. Norfolk & W. R. Co.*, 36 Fed. 299 (Jury: Minor struck by low bridge); *Northern Pac. Coal Co. v. Richmond (C. C. A.)* 58 Fed. 756 (Jury: Boy of fourteen might not appreciate danger of stumbling over coal on track when setting brake).

Miscellaneous.

Coullard v. Tecumseh Mills, 151 Mass. 85 (Court: Boy of fifteen, of average intelligence, having cleaned machine by pulling down hinged apron, was injured by his hand slipping off); *Stuart v. West End St. Ry. Co.*, 163 Mass. 391 (Court: Boy of twenty feeding a power hay-cutting machine by hand); *Donahue v. Drown*, 154 Mass. 21 (For jury: Girl of twenty, set to clean a machine, which started suddenly, was familiar with machine, though did not know it would start, but knew other machines had started. The cause was shifting of belt, owing to improper construction); *Glover v. Dwight Mfg. Co.*, 148 Mass. 22 (For jury: Girl of thirteen, while cleaning machine, was caught by spokes of wheel; first time she had attempted to clean wheel in motion, was not told about it, but did as the others did. It (452)

to know it. But when the danger is known in either of these ways, the further question arises whether the plaintiff knew the particular danger that caused his injury, or only the general fact of danger from the exist-

space, and dress caught in belt behind her); *Becker v. Baumgartner*, 5 Ind. App. 576 (Court: Shifting belt with stick); *Washington & G. R. Co. v. McDade*, 135 U. S. 554 (Jury: Putting belt on moving pulley not his business).

Circular Saws.

Wheeler v. Wason Mfg. Co., 135 Mass. 294 (Jury: Board, springing back, drew hand against saw. Plaintiff inexperienced); *Roskee v. Mount Tom Sulphite Pulp Co.*, 169 Mass. 528 (Court: Jumping of table); *Tenanty v. Boston Mfg. Co.*, 170 Mass. 323 (Court: Board caught on teeth and hurled forward. Plaintiff experienced); *Mississippi River Logging Co. v. Schneider* (C. C. A.) 74 Fed. 195 (Court: Wood caught and thrown by saw).

Insufficient Force for Work.

Texas & P. Ry. Co. v. Rogers (C. C. A.) 57 Fed. 378 (Court); *Texas & P. Ry. Co. v. Smith* (C. C. A.) 67 Fed. 524 (Court). See *Pennsylvania Co. v. McCaffrey*, 139 Ind. 430.

was necessary to move the wheel a spoke at a time, but it went further than she expected); *Flaherty v. Powers*, 167 Mass. 61 (For jury: Girl of seventeen, injured by spattering of caustic in her eye, knew machine would spatter, but did not know it was dangerous to her eye); *Rood v. Lawrence Mfg. Co.*, 155 Mass. 590 (Court: Boy of nineteen, of average intelligence, held shipper rod of elevator until his hand was struck by crossbeam; had been instructed by another boy, and run elevator himself); *Williams v. Churchill*, 137 Mass. 243 (Court: Boy of nineteen, experienced seaman, caught in loose end of line which he was making fast); *Ross v. Pearson Cordage Co.*, 164 Mass. 257 (Court: Girl of nineteen injured by sudden starting of machine, which was not caused by any defect in it); *Sullivan v. Lally*, 166 Mass. 265 (Court: Boy of fifteen injured by carelessness of fellow servant in starting elevator. "Even a boy must know, we think, that green hands are liable to do things which experienced hands would not"); *Davis v. Forbes*, 171 Mass. 548 (Court: A boy of two years' experience in riding and training colts can observe the condition of a stirrup strap, and appreciate the danger from it); *Levey v. Bigelow*, 6 Ind. App. 677 (Court: Boy of fifteen failed to

ing condition of things. How far into details must the plaintiff's appreciation of danger go? Thus, it is said: "Whether he knows and appreciates the details of the danger is immaterial, if he knows there is danger, and expressly contracts with regard to it, without caring to know the particulars; and in such case he must be deemed to encounter it willingly. * * * When he agrees to assume the risk from a certain kind of machinery, his action is equally voluntary in reference to every such risk, whether he fully appreciates the danger or chooses to take the risk of it without knowing its extent."²¹⁵ "The mere fact that he cannot tell the exact degree of the danger, if the nature and character of it can easily be seen, is not enough to require warning and instruction to a man of full age and intelligence. Something may properly be left to the instinct of self-preservation, and to the exercise of the ordinary faculties which every man should use when his safety is known to be involved. In this case it may be that no one could tell the exact degree of the force with which the hay would move forward with the traction of the knives, nor just how great the danger was until he ascertained by

secure shipper he knew was loose); *Louisville, N. A. & C. Ry. Co. v. Cornelius*, 14 Ind. App. 399 (Jury: Boy injured by removal of supports in mine); *Keiley v. The Cyprus*, 55 Fed. 332 (Court: Boy of sixteen knew of defective ladder); *Wallace v. Standard Oil Co.*, 66 Fed. 260 (Jury: Boy of seventeen, working about oil tanks, sent to office to get warm, and his saturated clothes caught fire); *Cudahy Packing Co. v. Marcan* (C. C. A.) 106 Fed. 645 (Court: Boy of seventeen; slippery floor).

²¹⁵ *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135; *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153; *Lynch v. Chicago, St. L. & P. R. Co.*, 8 Ind. App. 516.

actual experiment; but anybody could see at once that there was danger in doing the work unless care was used to avoid letting the fingers be drawn forward to the knives. Anyone knowing that there was such danger would be expected to proceed with great caution until he became familiar by experience with the forces with which he had to deal."²¹⁶

Therefore, where the plaintiff knows or is bound to know of danger arising from the condition of things, the fact that he does not know or appreciate the extent of the danger, or elements causing greater danger than he expects, is not material.²¹⁷

²¹⁶ *Stuart v. West End St. Ry. Co.*, 163 Mass. 391, 393; *Detroit Crude-Oil Co. v. Grable* (C. C. A.) 94 Fed. 73 (bolts on flywheel).

²¹⁷ Knowing of structures near track, he need not know of the particular one which causes the injury, *Lovejoy v. Boston & L. R. Corp.*, 125 Mass. 79; *Thain v. Old Colony R. Co.*, 161 Mass. 353; knew that some cars had no check chains, but did not know about this one, *Ladd v. New Bedford R. Co.*, 119 Mass. 412; knowing of flying switches, immaterial that plaintiff had never made one himself, *Coombs v. Fitchburg R. Co.*, 156 Mass. 200; knowing that damaged cars were placed on side track, but did not know about this car, *Yeaton v. Boston & L. R. Corp.*, 135 Mass. 418; knowing that there were spikes in ties which might catch him, immaterial that he did not know of the particular one, *O'Neil v. Keyes*, 168 Mass. 517; knowing that car jolted, he took risk of the jolt being greater or less, *McCauley v. Springfield St. Ry. Co.*, 169 Mass. 301; knowing that moving machinery was dangerous, immaterial that its danger is enhanced by the presence of set screws or keyways of which he did not know, *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153, *Connelly v. Hamilton Woolen Co.*, 163 Mass. 156, and *Ford v. Mount Tom Sulphite Pulp Co.*, 172 Mass. 544; immaterial whether plaintiff knew that, if he fell in well, he would get wet or scalded, *Feely v. Pearson Cordage Co.*, 161 Mass. 426; knowing that there are tears in cloth which might catch his hand, immaterial that boy did not know there were holes also, *Shine v. Cocheco Mfg. Co.*, 173 Mass. 558; knew that fingers might be caught, but not that whole hand might be drawn in,

But this rule cannot be applied unless it clearly appears that the plaintiff must have known and appreciated the fact that there was danger. Thus, where a person employed as a blacksmith was sometimes called upon to help move cars, and while doing so was crushed between the car and building, it could not be said, as a matter of law, that he appreciated the danger. "The plaintiff had a general knowledge of the position of the track and of the building with reference to each other, and he also knew that cars were sometimes moved along there. * * * He had never before been called on to help in moving a car in the place where the accident occurred, and he had never before been through that particular space between the car and that corner of the building. Of course, he could see that this space was narrow; but it would seem that neither he nor the others who were pushing on the same side of the car with himself understood that it was too narrow to allow them to pass through in safety. This was his mistake. Seeing the situation in a general way, he took hold among the others, and tried to pass through what proved to be too narrow a place for him. He did not rightly estimate the probability or extent of the peril to which

Pratt v. Prouty, 153 Mass. 333; knew that fingers might be caught, but not that clothing would be caught on adjoining machine, Downey v. Sawyer, 157 Mass. 418; knowing beam was wet, and that soda ash was used, immaterial that he did not know it was on beam, Thompson v. Norman Paper Co., 169 Mass. 416; knowing the general manner in which supports were constructed, he need not know about the particular one, Louisville, N. A. & C. Ry. Co. v. Quinn, 14 Ind. App. 554; knowing the danger of planing large pieces of wood, he knows also the dangers in planing small pieces, Guedelhofer v. Ernsting, 23 Ind. App. 133; knew that culverts were all open, but not about this particular one, West v. Southern Pac. Co. (C. C. A.) 85 Fed. 392.

he was exposing himself. Though he could see the position of the car and of the building, it might nevertheless be found by a jury that he did not appreciate, and in the exercise of due care was not bound to appreciate, the danger."²¹⁸ So, where a machine containing a mixture of gum and caustic soda splattered and burned somewhat, but, though the plaintiff knew this, she did not know that if it flew in her eye it would be dangerous to the sight, the question whether she knew and appreciated this danger was for the jury.²¹⁹ So, where a plaintiff knew generally of the rotten condition of a floor, but not the extent of the decay or its condition in the place where he broke through, the question was for the jury.²²⁰

§ 98. Presumptions as to knowledge.

The master may assume that a servant offering himself for employment is possessed of common knowledge, and will exercise ordinary care to protect himself; and, further, if he is

²¹⁸ *Ferren v. Old Colony R. Co.*, 143 Mass. 197, 199.

²¹⁹ *Flaherty v. Powers*, 167 Mass. 61.

²²⁰ *Huddleston v. Lowell Machine Co.*, 106 Mass. 282; *De Pauw Co. v. Stubblefield*, 132 Ind. 182. See, also, *Jarvis v. Coes Wrench Co.*, 177 Mass. 170 (board bounding back from circular saw); *Bjbjian v. Woonsocket Rubber Co.*, 164 Mass. 214 (feeding leather between rollers); *Houlihan v. Connecticut River R. Co.*, 164 Mass. 555 (ignorance of defective board in trestle on which plaintiff walked); *Richardson v. Swift & Co.* (C. C. A.) 96 Fed. 699 (knew of knives in sausage machine, but not that meat formed a crust that would cave under pressure of hand); *Great Northern Ry. Co. v. Kasischke* (C. C. A.) 104 Fed. 440 (knew coal chute was defective, but not of other defects causing coal to fall); *Bohn Mfg. Co. v. Erickson* (C. C. A.) 55 Fed. 943 (might not know that revolving knives created a suction that would draw hand in); *Blumenthal v. Craig* (C. C. A.) 81 Fed. 320 (defective guard does not necessarily give notice of increased risk).

of mature years, that he is competent to perform the duties and appreciate the ordinary or obvious dangers of the service for which he applies, unless the contrary appears.

The court, in determining the servant's disabilities, puts itself in the position of the master, and the presumptions or inferences of the plaintiff's knowledge which it holds are the same which the master must make whenever he hires a servant. The master, knowing or being bound to know whatever due care would disclose to him of the dangers of his business and the hazardous conditions of the places, machinery, and appliances used in his work, is under a duty to warn the person whom he invites to his premises of all risks that it is expected the servant will encounter in the course of his work; and the existence of this duty of warning is determined by what the servant knows or is bound to know concerning them.²²¹ In stating here what the master is entitled to assume in regard to the capacity of his servant, reference must be made to the cases cited under incidental and obvious risks, which apply these assumptions to particular facts.²²²

In the absence of anything to show the contrary, the master has a right to assume that the servant knows those facts of common experience with which ordinary persons of his age and appearance are familiar,²²³—such matters as are within common observation and are according to natural law.²²⁴ He has also the right to assume that his servant will exercise reasonable care,

²²¹ *Supra*, § 92.

²²² *Supra*, §§ 90, 91, 93-96.

²²³ *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152.

²²⁴ *Mississippi River Logging Co. v. Schneider* (C. C. A.) 74 Fed. 195. See, also, *infra*, § 119.

under the circumstances, to inform and protect himself.²²⁵

The servant is presumed to possess ordinary intelligence, and the master, unless he is reasonably to be charged with knowledge to the contrary, may act on this assumption.²²⁶ But, further: "The ordinary rule is that, when a person of mature years takes employment in a service, whatever the ordinary hazards, he must be presumed, in the absence of allegations to the contrary, to possess knowledge and skill fitting him for the service."²²⁷ "When a person of apparently sufficient age, physical ability, and mental caliber to perform the service seeks an employment at the hands of a railway company or other master, he ought to be held to an implied representation that he is competent to perform the duties of the position he seeks and competent to apprehend and avoid all dangers that may be discovered by the exercise of ordinary care and prudence. In such a case we know of no good reason or rule of law that will compel the master to pass him through a critical examination to discover his competency for the place, or that will convict the master of negligence for not so doing."²²⁸ Thus, a servant offering himself as a deck

²²⁵ *Infra*, § 111.

²²⁶ *Motey v. Pickle Marble & Granite Co.* (C. C. A.) 74 Fed. 155.

²²⁷ *Peterson v. New Pittsburgh Coal & Coke Co.*, 149 Ind. 260, 263.

²²⁸ *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151, 166.

"Undoubtedly, when one of apparent maturity and of average capacity solicits a particular line of work, the master has the right, in the absence of information, to assume that the applicant is qualified for the particular work applied for. It is only when such facts are brought to his notice of the disqualification of the servant to safely encounter dangers known to him, and presumptively unknown to the servant, that the duty of cautioning and instructing the servant

hand,²²⁹ or a carpenter,²³⁰ or the like, may be assumed to have the intelligence and experience necessary to recognize and avoid the dangers incident to the occupation or reasonably to be discovered.

The servant's implied representation extends only to that work which he seeks to do, and to the dangers arising in it, and not to all work throughout the master's business which he may be called upon to do. When it appears that the injury arose from a danger out of the scope of his original employment, the master is not entitled to the benefit of this representation; but the question is whether the danger is one which due care on the plaintiff's part would have discovered.²³¹

When the master is not actually informed of the servant's ignorance,²³² the chief consideration which should put him on inquiry is the age of the applicant.²³³ The appearance and apparent age and capacity are facts upon which the master may proceed, and which the court

arises." *Louisville & N. R. Co. v. Miller* (C. C. A.) 104 Fed. 124; *Wells v. Coe*, 9 Colo. 159; *American Wire Nail Co. v. Connelly*, 8 Ind. App. 398, 402; *Louisville, N. A. & C. Ry. Co. v. Frawley*, 110 Ind. 18; *O'Neal v. Chicago & I. C. Ry. Co.*, 132 Ind. 110; *Felton v. Girardy* (C. C. A.) 104 Fed. 127, 130.

²²⁹ *Sunney v. Holt*, 15 Fed. 880; *The Pilot*, 82 Fed. 111. "Plaintiff must be presumed to possess the usual knowledge in regard to the construction of steamboats; and as there is no allegation that this hatch was in an unusual place, he certainly ought to have known that there was a hatch there." *Malone v. Western Transp. Co.*, 5 Biss. 315, Fed. Cas. No. 8,996.

²³⁰ *Mentzer v. Armour*, 18 Fed. 373.

²³¹ See *infra*, § 105.

²³² Plaintiff said he did not know how to make a coupling, but was not instructed. *Louisville & N. R. Co. v. Miller* (C. C. A.) 104 Fed. 124.

²³³ Master could rely on plaintiff's statement as to his age. *Goff's Adm'r v. Norfolk & W. R. Co.*, 36 Fed. 299.

and jury may themselves consider;²³⁴ but the tendency of recent legislation for the greater protection of children employed in manufacturing pursuits imposes an obligation on the master to inform himself of the actual age of the servant and to govern himself accordingly.

Unfamiliarity with the language or with factories does not show a lack of common knowledge or ordinary capacity, and where such a one testified that "she knew nothing of the dangers of the machine, and the exceptions state that she was unfamiliar with machinery, the defendants had a right to assume that she had that knowledge which is acquired by common experience, and were under no obligation to warn her that if she put her hand between revolving cogwheels she would be hurt."²³⁵ And in a similar case it was said: "The plaintiff was mature, and the fact that she did not speak our language gave her no special rights. The defendant was entitled to assume that she knew the danger of such a combination as we have described; and, although she says she did not know it was there, she could have seen it if she had looked with any care."²³⁶

If the master in any way knows of facts relating to the capacity of the plaintiff to do the work required, he must, if he hires him, protect him against the danger. Thus, where a plaintiff had epileptic fits, it was a question of fact for the jury whether the defendant had knowledge of his condition, and was consequently negligent in setting him at work where he did.²³⁷

²³⁴ Keith v. New Haven & N. Co., 140 Mass. 175; Peaslee v. Fitchburg R. Co., 152 Mass. 155; De Costa v. Hargraves Mills, 170 Mass. 375. See Com. v. Emmons, 98 Mass. 6.

²³⁵ Ruchinsky v. French, 168 Mass. 68, 70.

²³⁶ Robinska v. Lyman Mills, 174 Mass. 432, 433.

²³⁷ Crowley v. Appleton, 148 Mass. 98.

§ 99. Duty to warn.

The master is bound to warn and instruct his servant as to all dangers which he knows, or in the exercise of reasonable care ought to know, and which he has reason to believe the servant does not know and would not by the exercise of reasonable care discover.

The duty continues during the employment, and cannot be delegated by the master.

The attempt has been made in the preceding sections²³⁸ to show what risks the servant accepts by virtue of his employment, and in considering this it was necessary to determine what it might fairly be assumed the plaintiff knew concerning the dangers, either from their character or his actual knowledge or previous experience of such things. When the court found that the risk was assumed, it also found, conversely, that there was no duty to warn or instruct the servant in regard to it; and when it could not, as a matter of law, find that the servant knew the risk, it submitted to the jury the question whether the defendant owed a duty to warn, and whether this duty had been performed with reasonable care. The cases cited in the preceding sections determine, therefore, either that, as a matter of law, there was no duty resting on the defendant to warn the servant in the particular circumstances, or that there might, on the facts, be such a duty which was negligently fulfilled, and consequently a jury should decide these two issues. In the present section some general rules concerning the duty to warn are considered.

The obligation of warning "is imposed mainly for the sake of the young, who have not the experience or power

²³⁸ *Supra*, § 88 et seq.

to look out for themselves which are to be expected in adults, or, in the case of adults, where there are concealed defects.”²³⁹ “In the early cases the doctrine was applied in favor of boys. In favor of adults it should be applied with great caution. Where the elements of the danger are obvious to a person using due care, it would be unreasonable to require an employer to warn his employe to avoid dangers which ordinary prudence ought to make him avoid without warning.”²⁴⁰ And “it is clear that, in respect to all matters wherein a young and inexperienced employe is competent to understand and avoid the dangers, such employe stands upon the same footing with an experienced adult.”²⁴¹

Both the adult and the child are treated as on the same footing in regard to risks of the negligence of competent fellow servants,²⁴² and both stand on much the same footing in regard to risks which common experience would lead them to expect and avoid. A “servant of mature years and of experience is charged by the law with knowledge of obvious dangers, and of those things that are within common observation and are according to natural law. In such case the master need not give warning of possible danger of which both parties have equal knowledge;”²⁴³ and “in hiring a boy twelve years of age, and apparently of average intelligence, an

²³⁹ *Robinska v. Lyman Mills*, 174 Mass. 432, 433; *O'Neal v. Chicago & I. C. Ry. Co.*, 132 Ind. 110.

²⁴⁰ *Stuart v. West End St. Ry. Co.*, 163 Mass. 391, 393.

²⁴¹ *Levey v. Bigelow*, 6 Ind. App. 677, 696.

²⁴² *Supra*, § 89; *Siddall v. Pacific Mills*, 162 Mass. 378 (must warn of incompetence); *Sullivan v. Lally*, 166 Mass. 265; *Chicago, St. L. & P. R. Co. v. Champion*, 9 Ind. App. 510.

²⁴³ *Mississippi River Logging Co. v. Schneider (C. C. A.)* 74 Fed. 195, 197.

employer is not called upon to tell him that if he holds his hand in fire it will be burned, or strikes it with a sharp instrument it will be cut, or thrusts it between the teeth of revolving cogwheels in the gearing of a mill it will be crushed. From infancy and through childhood, as well as in later life, we are all making observations and experiments with material substances, and every person of ordinary faculties acquires knowledge at an early age of those familiar facts which force themselves on our attention through our senses."²⁴⁴

The master owes to both the duty, in all cases, of disclosing "to the servant defects and dangers of which he has knowledge, or of which he ought to have knowledge by the exercise of reasonable attention, care, and diligence, and of which the servant has no knowledge, and would not discover by the exercise of reasonable care."²⁴⁵ But "where the dangers are obvious, such as can be seen and known by ordinary care and prudence in the use of the senses, it is held that the master need not advise his servants of their existence, and instruct them as to the necessary means of avoiding them, since they, equally with himself, are held to know both the fact of the peril and how to avoid it."²⁴⁶

The distinction between the adult and the child becomes important when it is necessary to presume knowledge from the character of the danger, and determine

²⁴⁴ *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152, 156; *supra*, §§ 95, 98.

²⁴⁵ *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151, 165; *Stuart v. West End St. Ry. Co.*, 163 Mass. 391, 393; *Mather v. Rillston*, 156 U. S. 391; *infra*, note 247.

²⁴⁶ *Louisville & N. R. Co. v. Banks*, 104 Ala. 508; *Holland v. Tennessee C., I. & R. Co.*, 91 Ala. 444.

whether it was obvious to a person of the plaintiff's apparent capacity. "The dangers of a particular position or mode of doing work are often apparent to a person of capacity or knowledge of the subject, while others, from youth, inexperience, or want of capacity, may fail to appreciate them; and a servant, even with his own consent, is not to be exposed to such dangers, unless with instructions and cautions sufficient to enable him to comprehend them, and to do his work safely with proper care on his own part. But the servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and, while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions."²⁴⁷

"In the absence of knowledge to the contrary, an em-

²⁴⁷ *Leary v. Boston & A. R. Co.*, 139 Mass. 580, 584. "This is particularly so where the master employs, for a hazardous and dangerous work, a child, young person, or other person without experience, and of immature judgment. In such a case, the master is bound to point out the dangers of which he has, or ought to have, knowledge, and give to the employe such instructions as will enable him to avoid injury by the exercise of reasonable care, unless both the danger and the means of avoiding it are apparent, and within the comprehension of the servant. * * * The person employed may be so young, inexperienced, and immature in judgment that no kind of warning and instruction would relieve the master from responsibility for injuries resulting from putting him at a hazardous and dangerous work." *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151, 165; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Sullivan v. India Mfg Co.*, 113 Mass. 396; *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153.

ploye may assume, as between the master and the servant, that one applying for a particular employment possesses the skill and judgment requisite to the safe and proper performance of his duty. But if the employment be one of a dangerous character, requiring skill and caution for its proper discharge with safety to the servant, and the master be aware of the dangers, and have reason to know that the servant is unaware of them, and that from his youthfulness, feebleness, incapacity, or inexperience does not appreciate them, the servant cannot, even with his own consent, be exposed to such dangers, unless he be cautioned and instructed sufficiently to enable him to comprehend them, and, with proper care on his own part, do his work safely. * * * The principle is that, if an employer knows that the servant will be exposed to risks and dangers in any labor to which he assigns him, and is aware that the servant is from any cause disqualified to know, appreciate, and avoid such dangers, the dangers not being obvious, the master is guilty of a breach of duty, unless he gives such reasonable cautions and instructions as should reasonably enable the servant, exercising due care, to do the work with safety to himself."²⁴⁸

Whether the danger is obvious or not, and consequently whether there is any duty to warn, must be measured by the capacity of the person; and thus, although warning is to be cautiously imposed in the case of adults, it is not confined to instances where the servant "is a man of manifest imbecility."²⁴⁹ In the case

²⁴⁸ *Felton v. Girardy* (C. C. A.) 104 Fed. 127, 130; *supra*, § 98.

²⁴⁹ *Atkins v. Merrick Thread Co.*, 142 Mass. 431. As to obvious dangers, see *supra*, § 95.

of minors the age is of controlling importance, and there is no duty to tell them what it must be assumed they already know. "The presumption of fact is that he was possessed of intelligence which is common to boys of sixteen years of age, and the presumption of law, in the absence of evidence to the contrary, is that a boy of that age is capable of recognizing and appreciating such ordinary and patent danger as is incident to climbing, or attempting to climb, upon moving cars."²⁵⁰

There is another class of risks to which no warning is attached in favor either of adults or of minors. When the condition of the work in which the plaintiff is engaged changes as to its safety as it proceeds, transitory dangers may arise, against which the master is unable to guard either by his conduct of the work or by his instructions in regard to them, and, since warning is impracticable, the plaintiff must exercise due care, when they occur, to avoid them.²⁵¹

Extent of warning.

The master does not discharge the duty cast upon him by giving a general warning of danger, but he is bound so to point out and instruct about the risk that the servant may appreciate what he is to encounter and know how he may avoid it. "The obligation of the employer would not necessarily be discharged by merely informing the boy that the employment itself, or a particular place or machine in the building or room in which he was set to work, was dangerous. Mere information in advance that the service generally, or a

²⁵⁰ *Worthington & Co. v. Goforth*, 124 Ala. 656, 660. As to dangers obvious to minors, see *supra*, § 96.

²⁵¹ *Supra*, § 91.

particular thing connected with it, was dangerous, might give him no adequate notice or understanding of the kind and degree of the danger which would necessarily attend the actual performance of his work."²⁵² Thus, posting a notice of danger is unavailing unless it designates the defect or risk;²⁵³ and where on a defective elevator was posted the sign, "All persons riding on this elevator do so at their own risk," the plaintiff was allowed to go to the jury on the question whether, from the length of time the notice had been posted and the use made of the elevator, he could assume that he could safely ride.²⁵⁴

"It is not necessary that a servant should be warned of every possible manner in which injury may occur. He must examine his surroundings, and take notice of obvious dangers and the operation of familiar laws. It is sufficient if he, being ignorant, be warned of the dangerous nature of the employment, and how safely to operate a dangerous appliance. Here the injury arose, not from the manner of the operation of the slab saw, but the manner in which other operatives performed or failed to perform their duties. The danger arising from such failure was necessarily incident to the employment. The servant cannot justly demand that he shall be warned against risks that are as obvious to him as to the master."²⁵⁵ There is also no duty to

²⁵² *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 597; *American Strawboard Co. v. Forest*, 12 Ind. App. 421.

²⁵³ *Blumenthal v. Craig* (C. C. A.) 81 Fed. 320.

²⁵⁴ *McNee v. Coburn Trolley Track Co.*, 170 Mass. 283. See, also, *McCarthy v. Foster*, 156 Mass. 511; *Bass v. Reitdorf*, 25 Ind. App. 650.

²⁵⁵ *Mississippi River Logging Co. v. Schneider* (C. C. A.) 74 Fed. 195, 201. The plaintiff at work on a bridge tried to steady himself (468)

warn of the exact degree of the danger, where the fact of danger is apparent.²⁵⁶

It is a continuing duty.

The servant has not only a right to warning when he enters the employment, but during the continuance of it the master is bound to warn and instruct him as to new risks which the servant may not be assumed to know. These risks arise from new duties or services required of the employe, from defects or dangers in the machinery, and from dangers which are caused by the work to be done.²⁵⁷ Thus, where one is set to work on a newly invented machine, it may be necessary to warn and instruct him about it;²⁵⁸ or where a spare wheel usually rested unlashed on a drum, but the master directed that it be lashed, so that, when the plaintiff was cleaning it, he was caught by the sudden starting of the machinery, he was entitled to notice of the changed condition.²⁵⁹

The duty cannot be delegated.

Where the duty of giving warning or instruction exists, it is personal to the master, and cannot be delegated to a fellow servant, so as to relieve the master of liability. "If there is, accordingly, under the circumstances of the particular case, a duty resting upon him in respect to giving notice to the servants of such special

by holding on to the wrench he was using, and the wrench slipped. It was impossible to warn against such an accident. *Garnett v. Phoenix Bridge Co.*, 98 Fed. 192.

²⁵⁶ *Stuart v. West End St. Ry. Co.*, 163 Mass. 391; *supra*, § 97.

²⁵⁷ *Infra*, §§ 105, 110.

²⁵⁸ *Walsh v. Peet Valve Co.*, 110 Mass. 23.

²⁵⁹ *Withcofsky v. Wier*, 32 Fed. 301; *Cincinnati, N. O. & T. P. Ry. Co. v. Gray* (C. C. A.) 101 Fed. 623 (new switches put in).

peril, that duty is not discharged by delegating the performance of it to a third person. The servants should not be held to assume and undertake to bear the risk of latent and concealed perils, merely because the master takes reasonable care and pains to give notice of them. It is more reasonable to hold that, where the danger is known to the master and unknown to the servant, the master should be held to see to it that the servant, when put upon work which exposes him to the danger, should be informed of it."²⁶⁰

The care used in giving the instructions is a question for the jury;²⁶¹ and, when an instructor is appointed, his conduct may be such as to mislead or misinform the servant. Thus, where the plaintiff was set at work guiding pieces of rubber through revolving rollers, and on the second day of employment, the distance between the rollers having been increased, but not obviously, the rubber fell through suddenly, the plaintiff looked at his instructor, who laughed, and said nothing, and the plaintiff then did as before, and was caught, it was held that the jury might properly find negligence.²⁶² So, where an ignorant person was employed on a picker, and "there was evidence that the picker boss had removed clogs without stopping the beaters in the presence of the plaintiff, and had thus set an example which it might be dangerous for the plaintiff to follow," the ques-

²⁶⁰ *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294, 298; *Avilla v. Nash*, 117 Mass. 318 (foreman failed to inform servant of rules, as directed).

²⁶¹ *Sullivan v. India Mfg. Co.*, 113 Mass. 396 (told to "do as the other boy did").

²⁶² *Bjbjian v. Woonsocket Rubber Co.*, 164 Mass. 214.

tion was for the jury.²⁶³ Again, a minor was shown how to sprag cars, and he attempted to do so near where his teacher had done it, but was crushed because of the narrowness of the space. It was held that he could assume that the spot was not dangerous.²⁶⁴

Although the master should have warned, yet, if the plaintiff acquires knowledge from a fellow servant, he goes into the danger without excuse.²⁶⁵

§ 100. When place or machinery is not furnished by master.

The master's duty to the servant extends only to such places, machinery, or appliances as are furnished for his use, and over which the master exercises control.

The risks arising from ways, works, and machinery not in the master's control or furnished to him are assumed by the servant.

The master can be negligent only where he owes a duty to the servant, and he owes no duty where the servant uses places or materials not furnished him by the master, and over which the latter has no power of control. Thus, where third parties hired a truck and driver from the defendant, and built on the truck a superstructure, which fell and injured the driver, and the latter sued the defendant, whose general servant he was, it was held that he could not recover. "It is well settled that a master is under an implied obligation to the servant to furnish him a reasonably safe place in which to render the services for which he is employed.

²⁶³ *De Costa v. Hargraves Mills*, 170 Mass. 375. See *Robinska v. Lyman Mills*, 174 Mass. 432.

²⁶⁴ *McNamara v. Logan*, 100 Ala. 187. See, also, *Medway v. Greenwich I. L. Co.*, 14 Times Law R. 291.

²⁶⁵ *Alabama Connelville C. & C. Co. v. Pitts*, 98 Ala. 285.

But this obligation is not absolute, and circumstances may vary it. Where a driver is employed to drive a truck, he has the right to rely on the master taking due care to give him a safe truck, and a safe seat thereon upon which to ride, provided, in the exercise of reasonable care on his part, he does not discover any defect himself. But where, in the course of the employment, the acts of third persons, not employed by the master, may increase the danger of the service, and these acts and their character are under the eye of the servant, and, to the servant's knowledge, are not under the supervision of the master, we do not think the master is liable if injury results to the servant from the negligence of the third persons. For instance, where a servant is directed to take his truck to a distant point, and from there obtain a load of merchandise to be put on by the servants of the third person, and the merchandise is loaded so carelessly that on the return journey the driver suffers an injury from the defective loading, it seems clear to us that he cannot hold his master liable therefor. This is the law, because it is reason. Where the servant has greater opportunity than the master to know and observe the probable results from the acts of the third person, of which the master, to the knowledge of the servant, has had no opportunity to judge, then it is unreasonable to hold that, with respect to such acts, the master has any obligation to the servant. Of course, there are cases where the circumstances necessarily impose on the master the duty of supervising and inspecting the work of third persons which may subject the servant to risk and danger. Thus, the loading of cars on a railway line is usually inspected by a railway in-

spector before it is received. But where there is no such inspection, and where, in the nature of things, there cannot be, the servant cannot hold the master for the work of third persons. The defendant company, it is conceded, had nothing whatever to do with the materials or the place of construction of the temporary platform. The company did not supervise it, and it was not intended by the Grand Army people that it should. The plaintiff below admits that he had no reason to believe that the superintendent of the company had taken any part in the erection or supervision of this structure. How, then, could he rely on an implied obligation that the master would see to it that this structure was not dangerous? * * * The injury resulting would be caused by the members of the executive committee of the Grand Army Post, and to them alone would the injured driver have to look."²⁶⁶

A railroad, likewise, is not liable to its brakeman, who is knocked from a car by a wire stretched over the track, not by the railroad, but by private individuals under permission of the city.²⁶⁷

The question becomes more doubtful where the servant, in the course of his work, is sent to or comes in contact with places and machinery not controlled by the master. Thus, where a lineman, in suspending a cable of his master, the defendant, was injured through the defective insulation of a wire belonging to another company, it was held that he could not recover;²⁶⁸ and a

²⁶⁶ *Hardy v. Shedden Co. (C. C. A.)* 78 Fed. 610, 612; *Carolans v. Southern Pac. Co.*, 84 Fed. 84 (negligent piling of freight on a wharf by a connecting carrier). See, also, *Beique v. Hosmer*, 169 Mass. 541.

²⁶⁷ *Dalton v. Receivers*, 4 Hughes, 180, Fed. Cas. No. 3,550.

²⁶⁸ *Chisholm v. New England T. & T. Co.*, 176 Mass. 125.

similar result was reached where the plaintiff was directed to climb a defective pole not belonging to his employer.²⁶⁹ In neither of these cases did the master furnish or control the dangerous place, although he temporarily used it. So, when a railroad places its cars by permission or agreement on tracks owned and controlled by another company, it owes no duty in regard to their condition to its servants, where they are not adopted as part of the ways of the defendant;²⁷⁰ but where the repairs on the track were paid for by the two companies, and it was used under contract, the master was responsible for injuries arising through defects in it.²⁷¹ Where the injury was received upon a private track, running over a wharf which was not controlled by the plaintiff's master, the defendant, it was held that the plaintiff had a right to assume that the track was a part of the defendant's system, unless he knew the contrary. "Whatever might be the rule under other circumstances, we must hold that a railroad train hand, employed in a branch of the service * * * where no duties fall on him which contain a call to ascertain the limits of the corporation's road, has a right to assume that any track upon which he is ordinarily sent in the performance of his duty, physically connected with the corporation's main line, is a part of its system, and that he is entitled to the usual care and protection of the corporation while running over it. Where a railroad corporation has running rights over a section of the main line of another, there would ordinarily be no diffi-

²⁶⁹ *Dixon v. Western Union Tel. Co.*, 68 Fed. 630, 71 Fed. 143.

²⁷⁰ *Supra*, § 42.

²⁷¹ *Smith v. Memphis & L. R. R. Co.*, 18 Fed. 3, 4. Compare *Wood v. Locke*, 147 Mass. 604, where the owner of the road was sued.

culty on this score, as the fact is commonly made known to train men by the printed rules and regulations given them for their direction, and in other ways. But, for a siding like this at bar, the presumption on the question of the trainman's knowledge is fairly against the corporation, and it is its duty to meet this presumption if it seeks to raise a defense of the character we are discussing. A railroad corporation ought not to be allowed ordinarily to send its trainmen upon private sidings or tracks for daily work, without making proper efforts in some way to provide for their safety."²⁷²

While the fact that the master does not control the places or machinery upon which his servant works, and therefore is not bound to keep them in a reasonably safe condition, relieves him from the charge of negligence on that score, it does not necessarily relieve him of the duty of warning and protecting his servant against dangers which he knows, although he cannot remedy them. The test of the master's duty would then seem to be the same as in any case of dangers known to him. He should warn when he cannot reasonably assume that the servant knows the danger, or would discover it and guard against it more readily than the master. Materials temporarily used or dangers created by the unforeseen acts of third persons would come within the class of dangers impossible to guard against, though, where the danger assumes a more permanent form, the duty of warning arises.

§ 101. Contractual assumption of risk applies only to servants.

The contractual assumption of risks applies only to servants.

²⁷² *Grand Trunk Ry. Co. v. Tennant* (C. C. A.) 66 Fed. 922, 929.

When a servant of one man is injured on the premises or by the machinery owned or controlled by another, the master owes him no duty to keep the place or machinery in a reasonably safe condition, and the servant's remedy for the defect lies against the owner. They are strangers to each other, and the defenses which may be set up are that the defendant was not negligent, that the plaintiff was guilty of contributory negligence, or that the plaintiff, knowing and appreciating the risk, voluntarily encountered it. The defense peculiar to the relation of master and servant—that the plaintiff accepted the risk of the negligence of the defendant's servants; that he accepted the risks incidental to the business, and the dangers that he knew or ought to have known when he went to work—is not applicable. There is no contract or relationship between the parties through which this defense arises. The contractual assumption of risks requires a knowledge, actual or constructive, of the danger, and an appreciation of it; and, where these are found, the fact that the plaintiff accepted the employment when he might have refused it, is sufficient to show that he took the chance of injury upon himself. But when the suit is between strangers there is no one fact which clearly shows an acceptance of the risk; therefore, the plaintiff is not to be denied recovery upon this ground unless a jury shall find that he voluntarily incurred the danger. The three facts of knowledge, appreciation, and voluntary acceptance of the danger must be specifically found.

Thus, where a passenger fell on the icy steps of a station, it was held: "Where the existence of negligence on the part of the defendants, and the absence of con-

tributory negligence on the part of the plaintiff, are specifically found as matters of fact, if the defendants desire to succeed on the ground that the maxim, *Volenti non fit injuria*, is applicable, they must obtain a finding of fact 'that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to waive it.' ²⁷³

In an English case,²⁷⁴ a contractor was hired by the defendant railroad to repair a tunnel where trains continually passed, and their approach could neither be

²⁷³ Osborne v. London & N. W. Ry. Co., 21 Q. B. Div. 221.

"The doctrine of the assumption of the risk, as distinguished from the doctrine of reasonable care, in an action between persons not master and servant, or not having relations by contract with each other, we think, must be confined to cases where the plaintiff knew and appreciated the danger, and voluntarily put himself in the way of it." Warren v. Boston & M. R. R., 163 Mass. 484, 488. The phrase "assumption of risk," as used here, means, of course, contractual assumption, but is employed to indicate also the defense expressed by "*Volenti non fit injuria*."

"It is difficult to say, where a man is lawfully working, subject to the orders of his employers, and to the risk of dismissal if he disobeys, that if, after asking for and failing to obtain protection from the danger caused by other people's work, he suffers injury, the maxim '*Volenti non fit injuria*' applies. It is true that he knows of the danger, but he does not willfully incur it." Where the plaintiff, servant of a carpenter, sued the contractors doing iron work for letting a piece fall upon him, he could recover. Thrussell v. Handy-side, 20 Q. B. Div. 359.

A convict is not a servant (supra, § 10), and the rules of contractual assumption of risk do not apply to him; but he must, nevertheless, use care, and, if he willingly consents to accept a known and appreciated danger, he cannot recover. Henderson v. Boynton, 173 Mass. 217. But see Chattahoochee Brick Co. v. Braswell, 92 Ga. 631. See, also, Membrey v. Great Western Ry. Co., 14 App. Cas. 179; Miner v. Connecticut River R. Co., 153 Mass. 398; Illingsworth v. Boston Elec. Light Co., 161 Mass. 583; Goddard v. McIntosh, 161 Mass. 258.

²⁷⁴ Woodley v. Metropolitan Ry. Co., 46 Law J. Exch. (N. S.) 521.

heard or seen. A servant of the contractor was injured, and sued the railroad. Of the five judges, two held the defendant not guilty of negligence. Mellish, L. J., held the defendant negligent, and that as the servant's rights were regulated by his contract, and he was not employed by the defendant, his recovery should not be barred because he did not quit the work. Accordingly, he and Baggallay, L. J., thought the defendant liable. Cockburn, C. J., though finding the defendant negligent, said: "If a man, for the sake of the employment, takes it, or continues in it, with a knowledge of its risks, he must trust to himself to keep clear of injury." That he was not a servant of the defendants makes no difference. "That which would be negligence in a company, with reference to the state of their premises or the manner of conducting their business, so as to give a right to compensation for an injury resulting therefrom to a stranger lawfully resorting to their premises in ignorance of the danger, will give no such right to one who, being aware of the danger, voluntarily encounters it, and fails to take the extra care necessary for avoiding it. The same observation arises as before." Judgment was given for the defendants. This case has not been overruled, but distinguished in the later cases on the ground that, as the plaintiff could have avoided the danger, but did not, he accepted the risk;²⁷⁵ and the present English rule seems to be that, unless the only possible inference from the plaintiff's conduct is a voluntary acceptance of the risk, the question of his acceptance must be left to the jury.²⁷⁶

²⁷⁵ *Thrussell v. Handyside*, 20 Q. B. Div. 359.

²⁷⁶ *Infra*, § 114.

In the same line is the Massachusetts case of *Wood v. Locke*,²⁷⁷ where the plaintiff was a brakeman employed by the Troy & Boston Railroad, and was injured by catching his foot in an unblocked frog in a yard owned by the defendant. By contract between the defendant and the Troy & Boston Railroad, the latter had a right to use this yard. The plaintiff knew the condition of the frogs and the danger. The court held that he could not recover. "It does not make in the plaintiff's favor that he was not in the employment of the defendant, but in that of the Troy & Boston Railroad Company, a corporation that was authorized to use the tracks. Whatever the obligations of the defendant may have been under the contract with that company, he was under no greater obligation to its servants to furnish a suitable road for them to work upon than he was to his own servants. The plaintiff, in going to work upon the tracks at the invitation of the defendant contained in the contract with the Troy & Boston Railroad Company, assumed, as against the defendant, the obvious and known risks of the employment arising from the defective construction or condition of the road, as fully as if he had gone upon the tracks under a contract with the defendant as his servant." The case holds that inasmuch as the plaintiff, by an unequivocal act of accepting employment upon tracks which his master used, accepted the known dangers of them, and while, as between his master and himself, this might more strictly be called a contractual assumption of the risk, yet between him and the defendant he came within the maxim, *Volenti non fit injuria*; and, as there was no doubt about his knowl-

²⁷⁷ 147 Mass. 604.

edge or acceptance of work under the conditions, he could not, as a matter of law, recover.

Although, as the case last cited shows, the distinction between contractual assumption of risks and *volenti non fit injuria* is sometimes slight and unimportant, yet, where the defendant is not the plaintiff's master, he cannot ask for a ruling in his favor where the evidence of the plaintiff's willingness to take the risk depends upon his conduct at the time, and not upon some unequivocal act, as going to work or remaining long at work under the dangerous conditions.

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CHAPTER IX.

ASSUMPTION OF RISK. (Continued).

- § 102. Dangers not Included in the Contractual Assumption.
- 103. Scope of Employment.
- 104. Servant Going of His Own Accord Outside the Scope.
- 105. Servant Sent by Master Outside the Scope.
- 106. Abrogating the Old and Making a New Contract.
- 107. Fear of Discharge.
- 108. Contributory Negligence.
- 109. Disobedience of Rules.
- 110. Temporary Orders and Duties of Master in Course of Work.
- 111. Reliance on Care of Master.
- 112. Equal Opportunity to Discover Danger.
- 113. Assurances of Safety.
- 114. Assumption of Risk by Continuance at Work.
- 114a. England.
- 114b. Massachusetts.
- 114c. Indiana.
- 114d. Alabama.
- 114e. Colorado.
- 114f. Federal Courts.
- 115. Promise to Repair.
- 116. Breach of Statutory Obligation.
- 117. Effect of Employers' Liability Act.
- 118. Court or Jury.
- 119. Judicial Notice.

- § 102. Dangers not included in the contractual assumption.

When, after the service has been entered into, new risks arise which, being unforeseen, are not included among the risks at that time assumed by the servant, his right to recover depends upon his conduct in reference to them, and either his contributory negligence or his voluntary consent to undertake them may bar him.

These subsequent risks fall into two classes:

- (a) **Those lying outside the scope of employment.**
- (b) **Those within the scope of the employment, but caused by either the servant's or the master's negligence.**

The preceding chapter considered the duties and the disabilities that are imposed on the master and on the servant when the employment is entered into, and construed the terms of the implied contract of service. It was found that the servant, on his part, takes upon himself all risk of injury from the negligence of competent fellow servants, from dangers incidental to the business, and from such peculiar dangers caused by the condition of affairs as he, at the time, knows or is bound to know. The master, on his part, is obliged to use reasonable care to hire and retain competent servants, to provide and maintain reasonably safe and proper ways, works, machinery, and materials for the work required, to conduct his business properly, and to warn of any risks which he cannot presume the servant knows. These disabilities and duties continue during the employment, and determine the rights of the parties whenever a loss that can be traced to them may happen. Within the limits of the risks assumed by the servant, the master owes him no duty, and in so far as the master's later acts or omissions do not substantially change, increase, or alter these risks, he cannot be held liable. When an injury is received, therefore, the court must determine whether it came within the risks assumed, or arose from the breach of a duty secured to the plaintiff.

In the present chapter it is proposed to consider the rights of the parties with reference to risks not existing and unforeseen at the time the original employment was

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accepted, and consequently not included among the disabilities imposed by law. There can be no recovery unless the master owes a duty to the servant in regard to these later risks, and, if a duty is imposed, the plaintiff by his own negligence or by his voluntary consent to undertake the risk may debar himself from relief. In cases of subsequent risks as well as in cases of risks assumed by acceptance of the employment, the court may often more readily decide the question of liability by considering the plaintiff's conduct than by determining whether or not there was a duty owed him.

Risks which are not covered by the contractual assumption may be roughly divided into two classes,—those lying outside the scope of the plaintiff's employment, and those which, being within the scope of his employment, are created by the unforeseen negligence of either of the parties.

With the exception of the negligence of fellow servants and dangers incidental to the business, the scope of the plaintiff's employment measures the risks which the servant assumes and the duties owed him.¹ Both the master and the servant expect that the dangers arising in the course of the work which the servant is hired to do will be the only ones encountered. When, therefore, the servant of his own accord steps out of his sphere of service and meets new dangers, he cannot expect that the master will protect him against them, and the master owes him no duty to do so; the servant acts at his own peril.² But if the master asks or requires the employe to perform some service outside the scope

¹ *Supra*, §§ 83, 88; *infra*, § 103.

² *Infra*, § 104.

of his employment, the risks encountered are ones which the servant did not, when he accepted work, expect to be called upon to meet, and the master is bound to warn and protect him against them so far as they are unknown to the servant. The extent of the invitation has been enlarged, and, if the servant accepts it, he accepts the perils that he understands, but may hold the master liable for those he does not.³ The same rule applies when the service the plaintiff is called upon to do is not of a temporary nature, but is either an entirely new kind of employment or differs substantially from the original one. When this is the case, the old employment is abrogated, and the same principles apply as if the new employment were offered and accepted in the first instance.⁴

In the second class of risks, the master has a right to expect that the places, materials, and machinery he furnishes for the work will be used by the servant with care to prevent injury to himself, and, if the servant fails to exercise such care, he cannot recover, irrespective of the master's negligence.⁵ When, however, the master has not performed some of the duties which he owes to the servant, upon the due performance of which the latter has a right to rely,⁶ he is *prima facie* liable for an injury caused by his default. He escapes responsibility only when the plaintiff's own negligence contributes to the injury,⁷ or when, understanding and appreciating the risk, the servant voluntarily consents to undertake it.⁸

³ *Infra*, § 105.

⁴ *Infra*, § 106. See, also, *infra*, § 107.

⁵ *Infra*, §§ 108, 109.

⁶ *Infra*, §§ 111-113.

⁷ *Supra*, § 84; *infra*, §§ 108-110.

⁸ *Infra*, §§ 107, 114, 115.

§ 103. Scope of employment.

The risks assumed by a servant are confined to those which he reasonably expected to encounter in doing the work he was hired to perform.

With reference to risks arising from the dangerous condition of the places, machinery, or appliances with which he is to work, a servant stands in the position of an invited person, and by accepting the employment runs the chance of injury from such dangers as he knew or was bound to know, but may recover from the master if injury happens through risks which the employer knew and he did not. Like other invited persons, his right to hold the occupier exists only as to the risks that come within the scope of the invitation given him. As to risks in places or machinery to which he is not invited, he is at best a licensee.⁹ The contractual assumption of risks must be confined, then, to those within his scope of employment and those he meets in doing the work for which he was hired.

"This presumption [of taking risks] cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it."¹⁰ "The servant's implied assumption of risks is confined to the particular work and class of work for which he is employed. There is no implied undertaking, except as it accompanies and is a part of

⁹ *Supra*, §§ 83, 88, 92, 102.

¹⁰ *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553. "His implied assumption of the risks incident to the particular work he is employed to do does not extend to more hazardous work outside of his contract of hiring, unless he voluntarily goes into such hazardous work." *Indiana N. & I. Gas Co. v. Marshall*, 23 Ind. App. 121, 126. See cases cited *infra*, §§ 104, 105.

the contract of hiring between the parties. Where the servant voluntarily and without directions from the master, and without his acquiescence, goes into hazardous work outside of his contract of hiring, he puts himself beyond the protection of the master's implied undertaking, and, if he is injured, he must suffer the consequences."¹¹

The scope of the plaintiff's employment is ordinarily, unless the evidence is not conflicting, a question of fact for the jury. Thus, it is a question for the jury whether a section hand working with one gang, and sent to work with another gang of section men, is ordered out of his employment,¹² or whether a night watchman, injured when coupling cars, did the service as a volunteer, or was hired by a foreman with authority.¹³ In a case where the foreman directed the plaintiff to come before seven o'clock, and do work which, though not necessarily in the master's business, was in furtherance of it, and the servant was injured by a failure to take precautions for his safety, it was held that he was in the master's service, and could recover.¹⁴ So, where the conductor of a freight train, whose work was over for the night, learned that a trestle across which he would have to take his train in the morning had become unsafe, and he went of his own accord to investigate, which was no part of

¹¹ *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151, 165.

¹² *Southern Railway v. Guyton*, 122 Ala. 231.

¹³ *Georgia Pac. Railroad v. Propst*, 85 Ala. 203. Where plaintiff has agreed not to couple cars save with a stick, he is out of his employment if he fails to use it. *Richmond & D. R. Co. v. Finley* (C. C. A.) 63 Fed. 228 (court). And so as to the places to which the master invites him to go. *Hanlon v. Thompson*, 167 Mass. 190. See, also, cases cited *infra*, §§ 104, 105.

¹⁴ *Sweeney v. McGilvray*, 24 Scot. Law R. 91. And see *supra*, (486)

his duty, and was injured through the defect, it was held that he could recover. "In the presence of an emergency, when an unusual situation presents itself, and the employe, having in view the general scope of his duty, voluntarily steps outside the strict bounds of his employment, he is justified if, under the circumstances of the case, common prudence fairly and reasonably called for his act."¹⁵

"The scope of his duties is to be defined by what he was employed to perform, and by what, with the knowledge and approval of his employer, he actually did perform, rather than by the mere verbal designation of his position."¹⁶

§ 104. Servant going of his own accord outside the scope.

When a servant, of his own accord, and without the direction of his master, steps outside the scope of his employment, whether on the master's business or on his own, the master owes him no duty as to the dangers he encounters, and is not liable for any injury received.

The duties imposed on the master by the contract of service relate only to the dangers and the places and machinery which he expects the servant will encounter or use in doing the work for which he is hired.¹⁷ "If an employe quits the work assigned to him by his employer, and voluntarily undertakes to do work about which he had no duties to perform by virtue of the con-

¹⁵ *Terre Haute & I. R. Co. v. Fowler*, 154 Ind. 682, 686. See, also, *Smith v. Lancashire & Y. Ry.* [1899] 1 Q. B. 141; *Lowe v. Pearson* [1899] 1 Q. B. 261; *Johnson v. Armour*, 18 Fed. 490.

¹⁶ *Rummell v. Dilworth, Porter & Co.*, 111 Pa. 343, 348. See, also, *supra*, § 13.

¹⁷ *Supra*, §§ 102, 103.

tractual relation existing between him and his employer, then, while such condition exists, the duty growing out of that relation, of using care for his safety, does not rest on the employer. Therefore, the rule obtains that, to hold an employer liable as such for injury resulting from a breach of such duty, it must appear that the employe was at the time of the injury acting within the scope of his employment."¹⁸

When the plaintiff is injured in a place where he has no right to be, or by machinery which the scope of his employment does not require him to use, if he went out of his employment for some private purpose, and not on his master's business, he has no cause of action against his employer. Thus, where a minor was caught by a setscrew on a shaft which he tried to step over, placed in a part of the factory where he had no business to go,¹⁹ or where a brakeman, for a private purpose, descended a car, and was struck by a tank near the track,²⁰ or where the plaintiff, knowing a fast train was due, used a handcar for his own purposes,²¹ he could not recover.

¹⁸ *Southern Railway v. Guyton*, 122 Ala. 231, 240; *McGhee v. Campbell* (C. C. A.) 101 Fed. 936 (whether ordered to use hand car in violation of rule).

¹⁹ *Andersen v. Berlin Mills Co.* (C. C. A.) 88 Fed. 944; *Evans v. American Iron & Tube Co.*, 42 Fed. 519 (Jury: Boy of twelve); *Colorado C. & I. Co. v. Carpita*, 6 Colo. App. 248 (Court: Miner went where roof had fallen, and where he was not employed, and stayed talking with another servant).

²⁰ *Wilson v. Louisville & N. R. Co.*, 85 Ala. 269; *Louisville & N. R. Co. v. Woods*, 105 Ala. 561 (told to remain at brake; brakeman crossed to another car); *Cunningham v. Chicago, M. & St. P. R. Co.*, 17 Fed. 882 (yardman boarding switch engine).

²¹ *Wright v. Southern Ry. Co.*, 80 Fed. 260.

Even if the acts done by the servant outside his employment are for his master's benefit, and not his own, he cannot recover for injuries received, since the master did not command or acquiesce in the servant's action, and therefore should not be obliged to protect him. Thus, where the plaintiff, of his own accord, ran a circular saw instead of attending to his duties as helper,²² or where he volunteered to make repairs out of the scope of his employment,²³ he could not recover for the risks encountered. If, however, the master acquiesces in the act, it would seem that it became part of the employment, and duties were imposed upon the master. Where, also, the act is for the master's benefit, it is often a question of fact for the jury whether it may not reasonably be held to fall within the scope of the original service.²⁴

§ 105. Servant sent by master outside the scope.

When the master, or a fellow servant with authority, directs an employe to do a temporary service outside the scope of the work he was hired to perform, a duty is imposed to warn him of risks to be encountered which the master may not reasonably assume the servant knows, and the relation of master and servant as to such work exists.

By obeying the order, the employe assumes the risk of the negligence of fellow servants, and of dangers incidental to the business or arising from the condition of affairs and obvious to him.

The risk may be so great that it is contributory negligence

²² *Brown v. Byroads*, 47 Ind. 435 (Court); *Alabama G. S. R. Co. v. Hall*, 105 Ala. 599 (Court: Brakeman acting as fireman). The *Samuel S. Thorpe*, 99 Fed. 108 (voluntarily offering to do another's work, *quaere*).

²³ *Mellor v. Merchants' Mfg. Co.*, 150 Mass. 362 (Court).

²⁴ *Supra*, § 103.

to undertake it; but, if an ordinarily prudent and careful man would undertake it, his obedience, although under threat of discharge, is a voluntary assumption of the risks.

Although, when the plaintiff enters the service, he expects to be required to do only the work for which he is hired, and encounter only the risks attendant upon it,²⁵ yet the employer may properly ask him to undertake some other temporary service outside the scope of the employment, and is not guilty of negligence in so doing.²⁶ When such a service is requested or ordered, the plaintiff must determine whether he will obey or not, and he has the same freedom of choice to accept or not as when he seeks or is offered an original employment.²⁷

The order may be sudden, and the service required only temporary, and offering different degrees of hazard; but the master is not negligent in giving such an order, though he has no right, under the contract of hiring, to require obedience to it. The servant must under all the circumstances elect what course to take, and stand by his decision as it is evidenced by his conduct.²⁸

The rule is well settled that, if the service is of a char-

²⁵ Supra, §§ 102, 103.

²⁶ *Leary v. Boston & A. R. Co.*, 139 Mass. 580. This may be, however, a breach of contract. *Wood, Master & Servant*, § 89. See *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553; *Cole v. Chicago & N. Ry. Co.*, 71 Wis. 114; supra, § 82.

²⁷ *Leary v. Boston & A. R. Co.*, 139 Mass. 580; *Reed v. Stockmeyer* (C. C. A.) 74 Fed. 186; *Priestley v. Fowler*, 3 Mees. & W. 1. Cases cited note 34, and infra, § 107.

²⁸ Infra, § 107. Where order is sudden, leaving no time for thought, plaintiff is not necessarily negligent in obeying. *Birmingham R. & E. Co. v. Allen*, 99 Ala. 359.

acter so dangerous that no reasonably prudent man would undertake it, the plaintiff must be held guilty of contributory negligence if he obeys.²⁹

There is, however, a sharp difference of opinion as to the duty of the master towards the servant when he gives an order for the performance of a temporary service without the scope of the employment. In Indiana and a few other jurisdictions it is held that there are no implied undertakings, in such case, between the parties. The master warrants the safety of the places and machinery to which he sends the plaintiff, and the latter does not assume the risk of the negligence of the servants he meets, or of the dangers, though known to him, which he encounters, unless, as is stated above, they are of such extraordinary hazard that no prudent man would take the chance of injury. The maxim, *Volenti non fit injuria*, does not apply, because the fear of or liability to discharge for refusal robs his act of its voluntary character.

Thus, in Indiana it is said: "If the master orders him to work temporarily in another department of the general business, where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employes, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work and the risk of negligence on the part of such employes. * * * Whether or not the servant may be negligent in obeying such orders will depend

²⁹ *Davis v. Western Ry.*, 107 Ala. 626 (Court: Obeying order to uncouple moving cars); *Orman v. Mannix*, 17 Colo. 564 (Jury: Boy of fourteen ordered to handle giant powder). Cases *infra*, notes 30, 31.

upon the facts and circumstances of each particular case. The facts and circumstances may be such as to show that in obeying such orders the servant voluntarily assumed the increased risk; or they may be such as to show that he obeyed the orders for a temporary change, under threats of discharge, or under such circumstances as that he might well have expected a discharge if he disobeyed. * * * When a servant is thus, by orders of the master, put at work outside of his employment, and is injured by reason of defective machinery, railroad track, etc., without his fault, the master is liable, regardless of the care he may have exercised to keep the machinery, railroad track, etc., in a safe condition. When a servant is thus ordered to work in a particular place, or with particular machinery, etc., outside of his employment, the master impliedly assures him, not only that he has exercised reasonable care to have the place, machinery, etc., in a safe condition, but also that they are in a safe condition, and fit for the business for which they are used. This principle or rule of the law has been more frequently and more rigorously applied in cases of employes immature in years, judgment, and experience."³⁰

³⁰ Pittsburgh, C. & St. L. Ry. Co. v. Adams, 105 Ind. 151, 165, 166 (section hand ordered to couple cars); Cincinnati, I., St. L. & C. Ry. Co. v. Lang, 118 Ind. 579 (section hand sent on special service injured by wild train); Brazil Block Coal Co. v. Gaffney, 119 Ind. 455 (boy of ten ordered to couple cars); Nall v. Louisville, N. A. & C. Ry. Co., 129 Ind. 260 (sent to clear debris after freshet, injured by servant); Brazil Block Coal Co. v. Hoodlet, 129 Ind. 327 (blacksmith, sent to mine, fell into unguarded shaft); Cincinnati, H. & I. R. Co. v. Madden, 134 Ind. 462 (section boss, ordered to unload rails, injured by servant); Louisville, E. & St. L. Con. Ry. Co. v. Hanning, 131 Ind. 528 (sent to repair car on side track); Diezl v. G. H. Hammond Co. (492)

So, in a federal case, the law is stated to be that "where a master commands a servant to go outside of his regular employment to do a work which is attended with special danger, and the servant, in response to the specific commands of his master, goes and does the work in the way and at the time directed, the fact that the servant knew it was dangerous does not exonerate the master from responsibility, or make the servant guilty of contributory negligence, unless the character of the danger is so patent and so extreme that no one but a foolhardy, reckless man would attempt it. For instance, where an engineer was told to take his engine in advance of a regular train over a track which he knew to be dangerous, and to keep out of the way of a coming train, and the engineer did so, and was killed, the fact that he knew the track was dangerous was held not to be such a fact as would render him guilty of contributory negligence. He had a specific command to take his engine and get to a certain point in advance of a following train. He had one of two alternatives, to obey the order, or leave the road. And, as the court say, it is not right that a burden should be cast on the employe either to say, 'I will not do the work, but quit the service,' or else be adjudged guilty of contributory negligence should an accident happen. But that rule has two or three limitations, one of which we think is ap-

156 Ind. 583 (directed to use hose without help); *Island Coal Co. v. Risher*, 13 Ind. App. 98 (sent to clear debris in mine); *Indiana N. & I. Gas Co. v. Marshall*, 22 Ind. App. 121 (using defective climbing irons). If servant is sent outside his employment, lack of knowledge need not be alleged or proved by him. *Clark County Cement Co. v. Wright*, 16 Ind. App. 630. The rule only applies to temporary change of employment. *Morewood Co. v. Smith*, 25 Ind. App. 264.

plicable to this case, and is this: That where a servant has equal means of knowing the danger, so that the master and servant stand equal in that respect, and the servant is not specifically commanded as to the time and manner in which the work may be done, but is told to do a particular thing, and has such discretion that he can have some control over the means, time, and manner of doing the work, then, unless he does it in a way and with the means which will be safest, he is guilty of contributory negligence. Thus, take an illustration from the case which I have just cited, where the engineer was told to run his engine over the track and to keep out of the way of a following train. He had no alternative but to run his engine at such speed as would keep it out of the way of this train. But suppose he was told to take his engine and run it to such a place over a track which both parties knew to be dangerous, and the time at which he was to reach his destination was not specified, so that the rate of speed was reasonably within his control, and he, instead of going five miles an hour, which would be safe, goes at thirty miles an hour, which is unsafe, and on the trip he is injured, he cannot say, 'I was told to make that trip, and, although I went at that rapid speed, I am not guilty of contributory negligence.' Wherever he has within his control the means of securing safety, he cannot do it in the quickest time and in the shortest manner, and neglect all means of security to himself. If he does so, he elects to take the risk."³¹

³¹ *English v. Chicago, M. & St. P. Ry. Co.*, 24 Fed. 906, 908 (car repairer sent to mend top of high water tank, and obliged to stand on a narrow ledge, slippery with ice, and from which he fell. Held, the master was negligent; but as the plaintiff was not directed as to the time and circumstances of doing the work, he might have pro-

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The rule held in Alabama, Massachusetts, and some other jurisdictions is that, even though the servant may be directed to do temporary work outside his employment, he is not the less a servant. If he accepts, then his scope of employment "would include work specially assigned to him by the employer as well as that upon which he was usually employed,"³² and consequently the same implied obligations exist. The master is not answerable, therefore, for the negligence of fellow servants, and is bound to use reasonable care, only, to have the places and machinery to which the servant is sent safe for his use. If dangers exist, either because of the nature of the work required or the condition of the premises, machinery, etc., the servant assumes the risk if he

tected himself, and was negligent or took the risk); *Miller v. Union Pac. Ry.*, 12 Fed. 600 (ordering plaintiff to use defective car).

The same rule on the question of acceptance of the risk is established in Colorado. "If the unusual danger was not apparent to a mind like his, and he did not know nor have the means of knowing that he was incurring unusual and extraordinary danger in going upon the train, he might obey the orders of his master's representative without being guilty of contributory negligence. A servant is generally excusable for obeying orders in and about his master's business, where such orders are given by one in authority over him as a representative of the master, unless the danger to be incurred by such obedience is so plain and manifest that no prudent person would obey even under the penalty of being discharged from employment." *Colorado Midland Ry. Co. v. O'Brien*, 16 Colo. 219; *Denver, T. & G. R. Co. v. Simpson*, 16 Colo. 55; *Chicago, B. & Q. R. Co. v. McGraw*, 22 Colo. 363. See, also, *Lalor v. Chicago, B. & Q. R. Co.*, 52 Ill. 401 (laborer directed to couple cars); *Colorado Electric Co. v. Lubbers*, 11 Colo. 505 (Jury: Carpenter sent to remove electric light, and current turned on, could recover).

³² *Southern Railway v. Guyton*, 122 Ala. 231, 240 (sectionman sent with different gang); *Cole v. Chicago & N. Ry. Co.*, 71 Wis. 114 (construction foreman doing switching),

knows or ought to know and appreciate the danger, and can hold the employer answerable if warning of dangers unknown to the servant is not given. The maxim, *Volenti non fit injuria*, applies, and conduct in obeying, even under threats of discharge, is, as a matter of law, a voluntary assumption of the risk. The plaintiff may, of course, also bar himself by his contributory negligence in undertaking extraordinary risks.

The Indiana rule has been thus criticised: "It makes the master an insurer that the ways, works, and machinery are absolutely secure. * * * We know of no principle of law which exacts a higher degree of care and diligence on the part of the master to his employe than reasonable care and diligence. When this has been done, it cannot be said that the master is guilty of negligence to his servants, so far as the negligence is attributable to defective ways, works, and machinery. Where the evidence shows that the employment is more dangerous than that within the scope of the employment, the law very properly holds the master liable, under proper circumstances, for such injuries as may result from the increased danger; but the liability here rests upon different principles from those which would make the master an insurer that the ways, works, and machinery were absolutely perfect. It cannot be said that the master has exercised reasonable care and diligence for the safety of his servant, when by his orders the servant is exposed to greater peril than that for which, by his contract of employment, he assumed, or when the master exposes his servant of immature years, or one inexperienced or unskilled, without proper instruction and warning as to the peril of machinery or ways

and works dangerous in their use. The master is not liable as an insurer against injury in such cases, but is liable for the consequences of a negligent omission of duty in failing to exercise reasonable diligence and care for their safety in thus exposing the servant to dangers outside the scope of the employment, or without proper instruction or warning.”³³

This is the same rule that is applied, as to the assumption of risks, when the servant originally enters the employment, and it is believed to be supported by the weight of authority, and sound in principle. It is thus expressed in a federal case: “The rule is not materially different in principle when a servant is directed to do a temporary work outside of the work which he has engaged to do. If there is nothing peculiarly dangerous in the new work, and the master has no reasonable ground for believing that the servant is unaware of the dangers he will encounter, or has not the requisite skill and experience to do the work with safety to himself, the servant may well be regarded, if he obey, as having assumed the usual and ordinary risks incident to the employment. * * * But when a servant is ordered by one having authority over him to do a temporary work beyond the work which he had engaged to do, and the superior knows, or ought to know, from all the circumstances of the case, that the work which the subordinate is directed to do is of a peculiarly dangerous character, and is aware, or under all the circumstances should be aware, that the risks and hazards of the work, or the proper mode of doing

³³ *Mary Lee Coal & Ry. Co. v. Chambliss*, 97 Ala. 171, 179 (fireman told to throw switch).

the work to avoid the incident risks, are not obvious or known and appreciated by the subordinate by reason of his youth, incapacity, or inexperience, it is the duty of the superior to caution and instruct such disqualified servant sufficiently to enable him to understand the dangers he will encounter, and how to do the work with safety if he exercise due care himself. The duty of qualifying the servant in such a situation depends upon the circumstances, as is also the case in an original employment, where the direction is to do a work within the legitimate scope of the original contract of service."³⁴ The assumption of risks in this, as in the case

³⁴ *Felton v. Girardy* (C. C. A.) 104 Fed. 127, 130 (Jury: Helper ordered on a holiday to repair firebox of locomotive, of which he was ignorant). "The liability upon the master in cases of injury to the servant received in a dangerous employment outside of that for which he had engaged arises, therefore, not from the direction of the master to the servant to depart from the one service, and to engage in the other and more dangerous work, but from failure to give proper warning of the attendant danger in cases * * * where the servant is of immature years, or unable to comprehend the danger." *Reed v. Stockmeyer* (C. C. A.) 74 Fed. 186, 189 (Court: Quarryman sent to work under rock, which fell through servant's negligence); *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553 (Jury: Boy ordered to adjust belt on moving machinery); *Hogan v. Northern Pac. R. Co.*, 53 Fed. 519 (Court: Ordered to couple cars); *Finley v. Richmond & D. R. Co.*, 59 Fed. 419; *Richmond & D. R. Co. v. Finley* (C. C. A.) 63 Fed. 228 (Court: Ordered to couple cars, in violation of rule); *Stevens v. Chamberlin* (C. C. A.) 100 Fed. 378 (Court: Called to repair machine, and injured by fellow servant); *Mansfield v. Baddeley*, 34 Law T. (N. S.) 696 (Jury: Seamstress sent to kitchen, where she was bitten by a savage dog); *Linch v. Sagamore Mfg. Co.*, 143 Mass. 206 (Court: Fireman told to repair boiler); *Ferren v. Old Colony R. Co.*, 143 Mass. 197 (Jury: Blacksmith called to move cars); *Leary v. Boston & A. R. Co.*, 139 Mass. 580 (Court: Truckman acting as fireman); *Patnode v. Warren Cotton Mills*, 157 Mass. 283 (Jury: Boy hurt on machine; danger not obvious); *Downey v. Sawyer*, 157 Mass. 418 (498)

of an original employment, is made to depend upon the plaintiff's knowledge and appreciation of the danger and his conduct in reference to it. The act of accepting an original employment with this knowledge, as a matter of law, shows a voluntary assumption of the risk, and fails to impose any duty on the master. One difference between the two rules above cited is that in Indiana it is considered that obedience to an order requiring special service is not, as a matter of law, a voluntary assumption of the risk, because the plaintiff is constrained to accept through fear of losing his employment. It is undoubtedly hard that a servant should be put in the position, when an order, lawful in itself, requiring some temporary service, is received, of obeying and taking the risk, or disobeying and being discharged. It is also hard that a person desiring work must, by taking it, assume dangers, at the cost, if he refuse, of being idle. In neither case does he have a contented and willing mind. Yet he is free to choose, and, if his choice is not the waiver of any *right* secured him, it would seem that, his conduct being the same, and possibly his motive also, the same rule should be applied, and in both cases he be held, as a matter of law, voluntarily to have assumed the risks.³⁵

It makes no difference, on the question of the master's

(Court: Boy told to put on belt caught in gears); *Martineau v. National Blank Book Co.*, 166 Mass. 4 (Jury: Set to repair machine); *Kanz v. Page*, 168 Mass. 217 (Court: Sent to clear room shattered by explosion); *Dougherty v. West Superior I. & S. Co.*, 88 Wis. 343 (making cores by hand power; told to work by steam power); *Prentiss v. Kent Furniture Mfg. Co.*, 63 Mich. 478 (told to run saw or lay off). See, also, cases cited *infra*, §§ 106, 107.

³⁵ *Infra*, §§ 107, 114.

liability, whether he himself gave the order, or whether it was given by a person under the act for whom the master is responsible, or by a fellow servant strictly. In the latter case it must appear that the plaintiff was bound to obey the servant, and that the latter had authority to give the order. Thus, in an action at common law, a fellow servant called a boy, the plaintiff, to help him on a machine which the plaintiff had been told by his overseer not to touch, and which was out of his employment, yet, the danger not being obvious, he was permitted to recover. "There was evidence for the jury that James McKeon, whose orders to help at the work on that machine the plaintiff obeyed, was the second hand of the room, and that therefore the plaintiff was under his authority. Even although the plaintiff would have been justified in refusing to obey the order if McKeon was second hand, and so in authority, the plaintiff might submit to McKeon's direction; and, if so, it would not be open for the defendant to say that he was not properly at work."³⁶ This did not make McKeon other than a fellow servant. The master was liable, not on the issue of McKeon's negligence, but on the issue whether he had authority to hire servants and give this order.³⁷

§ 106. Abrogating the old and making a new contract.

The master may at any time offer the servant new duties, or by changing the character of his business, or the machinery used in it, subject the servant to risks different from those

³⁶ *Patnode v. Warren Cotton Mills*, 157 Mass. 283, 287; *Georgia Pac. Railroad v. Propst*, 85 Ala. 203; *Reed v. Stockmeyer* (C. C. A.) 74 Fed. 186; and cases above cited.

³⁷ *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70, 73; *Stevens v. Chamberlin* (C. C. A.) 100 Fed. 378.

contemplated when the service was originally entered into, without being guilty of negligence.

If the servant accepts the new employment, or continues at work under the changed risks, he is deemed, as a matter of law, to have assumed them.

The law imposes no duty on a master causing him to be guilty of negligence if he offer, or require the servant to perform, permanently different services from those he engaged to do, or if he entirely change the character of his business or the risks of it by introducing new or different machinery or methods of working. A servant hired to do one kind of work may be put at another;³⁸ a street-railway company may decide to replace its horse cars by electric cars, or may introduce a new or different style of car;³⁹ and the change is not of itself negligence. The servant undoubtedly finds that, having agreed to render certain services, others are required, but unless he has an executory contract, and a right therefrom arising, he is without remedy against the master.⁴⁰

Such an act on the master's part is equivalent to a dismissal from the service and a new hiring. It is, in

³⁸ *O'Connor v. Adams*, 120 Mass. 427 (Jury: Sugar shoveller set at work on machine); *Leary v. Boston & A. R. Co.*, 139 Mass. 580 (Court: Freight truckman becoming a fireman); *Goodnow v. Walpole Emery Mills*, 146 Mass. 261 (Court: Machinist doing extra work for extra pay); *Veginan v. Morse*, 160 Mass. 143 (Jury: Mill yard man set to work on planer); *Consolidated Stone Co. v. Redmon*, 23 Ind. App. 319 (Jury: Quarryman set to work on machine). See cases cited *supra*, § 105.

³⁹ *Goldthwait v. Haverhill & G. St. Ry. Co.*, 160 Mass. 554 (Court); *Carrigan v. Washburn & M. Mfg. Co.*, 170 Mass. 79 (Court: Placing unrailed vats in works).

⁴⁰ *Infra*, § 107; *Leary v. Boston & A. R. Co.*, 139 Mass. 580.

effect, offering the servant a chance of new employment which he is free to accept or not. His acceptance then stands upon the same ground as if he were entering the service for the first time, and the disabilities imposed and the duties established are governed by the same rules. He assumes whatever dangers he knows, or is bound in the exercise of reasonable care to know,⁴¹ and he is entitled to warning against those he does not understand or appreciate.⁴² His conduct, whether he actually undertakes the new duties or continues at work under the changed conditions, affords but the inference of voluntary assumption of the known and appreciated risks, and therefore the court will direct a verdict against him.⁴³ The fear of discharge would seem to have no effect on the question of his voluntary assumption by continuance at work, since he was really discharged when the change was made.⁴⁴

It may be a question for the jury whether a new employment has been offered. Thus, where a mill yard man was injured while at work on a planer, the dangers of which he could not see, it was said "We cannot say, as a matter of law, that by the terms of his employment he took the machine as it was, although it may have been open to the jury to find that he had acquired such knowledge, and that he had been put to work on the

⁴¹ *Leary v. Boston & A. R. Co.*, 139 Mass. 580; *Goodnow v. Walpole Emery Mills*, 146 Mass. 261; *Goldthwait v. Haverhill & G. St. Ry. Co.*, 160 Mass. 554; *Carrigan v. Washburn & M. Mfg. Co.*, 170 Mass. 79; *Consolidated Stone Co. v. Redmon*, 23 Ind. App. 319.

⁴² *O'Connor v. Adams*, 120 Mass. 427; *Ferren v. Old Colony R. Co.*, 143 Mass. 197.

⁴³ Cases cited above. See, also, *supra*, §§ 88, 92.

⁴⁴ *Infra*, § 107.

machine so frequently that it had become one of the risks which he assumed under his later employment."⁴⁵

§ 107. Fear of discharge.

The weight of authority sustains the rule that the plaintiff's fear of discharge does not prevent a holding, as matter of law, that performance of work outside the scope of employment is a voluntary assumption of its known and obvious risks; but, if the risks arise through the master's negligence within the scope of the employment, undertaking them through fear of dismissal may present conflicting inferences to be decided by a jury.

The fear which a servant has that a refusal to obey an order of his master, or to undertake a risk arising from his master's negligence, will lead to his discharge from employment, can have no effect upon the question of his contributory negligence in encountering a danger. Whatever motives may induce a servant to run a risk, he must nevertheless exercise such care as the circumstances demand.⁴⁶ There is, however, some difference of opinion as to the effect to be allowed to this fear or motive when the question does not relate to the plaintiff's care, but to his voluntary consent to undertake known or obvious risks arising after his employment, and not covered by the contractual assumption.⁴⁷

It is clear that when the risk is known or obvious, and a plaintiff accepts employment, the act of accepting the work is a conclusive inference that he accepts the attendant risk, although in fact he may have objected

⁴⁵ *Veginan v. Morse*, 160 Mass. 143.

⁴⁶ See *Wescott v. New York & N. E. R. Co.*, 153 Mass. 460; *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151; *supra*, §§ 105, 106.

⁴⁷ Cases cited below in this section.

or complained about the danger.⁴⁸ The fear that, if he does not take the work, he will be compelled to remain idle, is not considered, and it is properly not considered because the employer is not bound to give him work. In like manner the employe's fear of discharge should be given weight only when it is a valid fear of losing some right which he has, and which the law may recognize. If the master has a right to discharge, or, having no right, does discharge, subject to payment of damages, the plaintiff has lost nothing, and his obedience or continuing at work in such circumstances is the making of a new contract of hiring, subject to the new disabilities, and the same rules should be applied as if he entered the service for the first time. It is only in the cases where the servant, to protect himself, has to leave the employment without the possibility of recovering damages for a breach of contract, that his conduct gives rise to conflicting inferences, which should be submitted to the jury.

It has been noted⁴⁹ that the rights, duties, and disabilities resting upon the master and upon the servant spring from two sources,—the contract or implied agreement, which determines the nature of the work to be done, the wages to be paid, and the duration of the employment, and the policy of the law, which defines the duties owed and the disabilities imposed upon such as enter into this relation with reference to personal injuries suffered through negligence. Breach of the former, or contract of hiring, gives a cause of action in

⁴⁸ *Supra*, §§ 88, 92. See *Kenney v. Hingham Cordage Co.*, 168 Mass. 278, 281.

⁴⁹ *Supra*, § 82; *infra*, § 114, note 159.

contract, and, when the breach is the wrongful discharge of the servant, the damages are compensation for the loss of the right to render the specified services for the remainder of the term. The duration of the employment is, in the absence of express agreement, a question of fact, and the general rule is that, where nothing appears to fix the term, it is a general hiring, determinable at the will of either party, though in some cases the payment of monthly or weekly wages has been considered, in the absence of other evidence, sufficient to show a hiring by the month or week. Whatever the term may be, however, the servant has a right to work only during that period, and a failure to re-employ him is not a ground for damages. If at the end of the period he renews the employment, he makes a new contract, as if he were then entering the service for the first time. The duties imposed by law, for breach of which an action of tort will lie, are measured by the condition of affairs when the employment is entered into, and the acceptance of a new employment imposes new duties and new disabilities.

The duration of the contract of hiring and the right of the master to discharge would seem, therefore, important factors in considering whether the plaintiff's obedience or continuing to work in face of the danger was a voluntary assumption of the risks, when his action was induced by a fear of discharge. If his act is the making of a new contract of hiring, then, since he is free to make it or not, it affords but one inference,—that he voluntarily accepted the risk,—and the court must hold that he cannot recover. But if his act is not the making of a new contract, but must be construed

as a waiver of his master's breach of duty towards him, and a consent to undertake the resulting risks, there are conflicting inferences. He may not be able to drop his work, or to afford to leave, or he may think he can work a little longer without injury, etc., which a jury, rather than a court, should decide.

When he is required to meet a risk without the scope of employment.

When the servant entered the employment, he agreed to render certain services, and no others. Accordingly, if the master orders him to perform any service not reasonably within the scope of his employment, the servant may refuse, and, if discharged for this cause, he has a right of action against the master for the loss occasioned him. If he was at work under a contract for a definite time, he may recover for the refusal to permit him to serve that time. If the contract permitted a discharge at any time, then he has suffered no damage, for he had no right to expect continued employment. In one case the contract is broken, and damages may be recovered; in the other case the contract has, by its own limitation, terminated. The plaintiff either has lost nothing to which he had a legal right, or may be compensated for his loss. He is thus, in legal contemplation, a free agent, and may obey the order and enter upon the new service or not, as he chooses. If he obeys, his act is the same as if he had made the contract for these services in the first place, and can only give rise to the inference of voluntary acceptance and consequent assumption of the risks.

If the order is to do an act outside the scope of the employment, the master is not on that account negli-

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gent in giving it, and, if it is in fact negligent, it is immaterial. The inquiry is not concerning the duty to use care, but the rights secured by contract. There would seem, also, to be no sound distinction possible between cases where the order is merely for a temporary service, and where it requires an entire change of employment, or where there is no order, but a change in the conditions of the employment.

In the leading case upon the subject⁵⁰ it was the contention of the plaintiff "that, if a servant who is hired for work of a simple character * * * is required

⁵⁰ *Leary v. Boston & A. R. Co.*, 139 Mass. 580.

It was urged that, in obeying the orders, the plaintiff "acted under compulsion, and should not be, therefore, held to have assumed the risks of the work he was directed to perform. It is conceded that he made no objection to the order, that he did not protest any incapacity to comprehend the risk, but that he was coerced into compliance with the order through fear of discharge in case of disobedience. That, however, does not charge liability upon the master. In the absence of restrictive contract provisions, the master is at liberty to discharge the servant at any time. So, likewise, is the servant at liberty to abandon his service at will. * * * Declining, he may lose employment: accepting, he assumes the risks attending the service, if he knows or has been properly warned of them. The servant is not under guardianship. He is a free man, at liberty to make such contracts as he will. That, through stress of circumstances, he consents to the orders of the master rather than be discharged from employment, does not impose liability upon the master because of such demand if he has otherwise performed the duty which the law imposes upon him with respect to the servant." *Reed v. Stockmeyer* (C. C. A.) 74 Fed. 186, 194; *Ferren v. Old Colony R. Co.*, 143 Mass. 197; *Linch v. Sagamore Mfg. Co.*, 143 Mass. 206; *Hogan v. Northern Pac. R. Co.*, 53 Fed. 519.

See, also, in accord, *Dougherty v. West Superior I. & S. Co.*, 88 Wis. 343 (objection to work by steam power of no avail); *Prentiss v. Kent Furniture Mfg. Co.*, 63 Mich. 478 (told to run saw or lay off). See *supra*, §§ 105, 106.

by his employer to perform other duties more dangerous and complicated, and, although at first constantly objecting thereto, from fear of losing his employment finally assents, makes the attempt, and, doing his best, is injured by reason of his ignorance and inexperience, he may maintain an action against his employer for negligence in setting him to work in a dangerous place, even if the plaintiff was aware of the danger, and might, under some circumstances, be held to have incurred the risks of the employment." The court denied this to be the law, and held: "Morally to coerce a servant to an employment, the risks of which he does not wish to encounter, by threatening otherwise to deprive him of an employment he can readily and safely perform, may sometimes be harsh; but when one has assumed an employment, if an additional and more dangerous duty is added to his original labor, he may accept or refuse it. If he has an executory contract for the original service, he may refuse the additional and more dangerous service, and, if for that reason he is discharged, he may avail himself of his remedy on his contract. If he has no such contract, and knowingly, although unwillingly, accepts the additional and more dangerous employment, he accepts its incidental risks; and, while he may require of the employer to perform his duty, he cannot recover for an injury which occurs only from his own inexperience."

This view has not been accepted in Indiana, and in a case where a blacksmith was sent out of his employment to make repairs in a mine, and fell into an unprotected shaft, it was said: "While the service cannot be compulsory in the sense that the employe can be (508)

compelled to work against his will, yet the very nature of the relation existing between the parties carries with it the irresistible inference of dependence upon the one side."⁵¹ And in a similar case it was said: "The facts and circumstances may be such as to show that in obeying such orders the servant voluntarily assumed the increased risk; or they may be such as to show that he obeyed the orders for a temporary change, under threats of discharge, or under such circumstances as that he might well have expected a discharge if he disobeyed."⁵² So, under the rule established in England, that if a defendant wishes to rely upon a voluntary assumption of the risk he must obtain a finding of the jury upon the issue,⁵³ it was held that where the plaintiff was directed to fix a belt box, which was no part of his duty, the question of his willingness to take the risk must be submitted to the jury.⁵⁴

When the risk arises within the scope of employment through the master's negligence.

By his contract of hiring, the servant agrees to perform all duties within the scope of his employment, and obey the directions of the master concerning them. The master thus has a right secured to him by the contract to have these services performed, and, if the employe refuses to obey or to do them, he may be discharged, and is without redress. This would be the case where the

⁵¹ *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 335; *Brazil Block Coal Co. v. Gaffney*, 119 Ind. 455 (boy of ten is under compulsion).

⁵² *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151, 165. See, also, cases cited in notes to sections 105, 106, *supra*.

⁵³ *Infra*, § 114a.

⁵⁴ *Baxter v. Wyman*, 4 Times Law R. 255.

order, although exposing to risks, is not negligent. The employe has a right to expect that the master will use due care in performing the duties imposed upon him by virtue of the relationship, and will not give negligent orders, or permit his ways, works, or machinery to fall into disrepair, or create new elements of danger. When the master has failed in any of these duties, and the servant knows and appreciates the danger to himself from the failure, a cause arises which ripens into a right of action when the employe suffers injury, and the master, being in default, can only escape liability by the servant's waiver of the breach and acceptance of the risk, or by his contributory negligence. The question which the court must decide is what conduct on the plaintiff's part amounts to such waiver and consent; and the general rule, which will be considered later,⁵⁵ is that mere continuance at work with knowledge and appreciation of the risk affords a conclusive inference that the risk was accepted. The courts are not entirely in harmony when it appears that the plaintiff continued at work, or obeyed his master's directions as to his work, because he feared that he would be discharged unless he ran the risk.

It would seem that the principles earlier stated should govern also in this case. The risks which the servant has to encounter by his master's act or omission are those arising within the scope of his employment, whether they are caused by negligence or not. If they are not caused by negligence, then, if he prefers to leave the service rather than undertake them, he must break his contract of hiring, and the master cannot be held

⁵⁵ *Infra*, § 114.

liable, either in contract or tort, for he has violated no right or duty. Generally, also, these are services which must have been contemplated when the contract of hiring was originally made, and therefore the risks of them accepted at that time. If the risks are caused by negligence, they may be so great as to amount not only to a breach of the master's duty to the plaintiff, but also to a breach of his contract, so that the servant might refuse to undertake them, and, if discharged for that cause, could have damages for it. When the risks are not of this character, if the plaintiff refused longer to serve, his discharge would not subject the master to damages. Thus, the master's default has cast upon the plaintiff the necessity either of leaving the service, and thereby losing something of legal value to him, or of remaining to run the risk of injury. Can it be said that remaining in such a case is a voluntary waiver of the default and an assent to take the risk of injury upon his own shoulders? If the servant is not compelled to give up any *right*, then the master's act does not prejudice him, and one element affecting his freedom of choice is taken away. If there is no executory contract for service for a definite time, as he may be discharged at any moment, he loses nothing by leaving. If there is such a contract, he cannot, as in the previous cases, leave and sue for the breach. Thus, the duration of the contract and the time when the master's negligence occurred would seem to be important in determining whether his fear of discharge was a **valid fear** or not, and whether it ought to affect him. Moreover, if his contract comes to an end during the continuance of the negligence, and he renews it, this is entirely a volun-

tary act, and his fear of discharge can have no bearing upon the disabilities which are then imposed. It is only, therefore, in the very narrow class of cases where the master's negligence occurs during the continuance of an executory contract, and is not of such a degree as would amount to a justification for the servant's leaving, and permit him to recover damages, that the plaintiff's state of mind should be considered on the question of his voluntary assumption of risks, and then only when the injury happens during the contract period, and not when it occurs after the period has elapsed and a new hiring, with its attendant risks, begun. In such a case the question of his voluntary assumption of the risk is a question for the jury; otherwise, for the court.

The cases have not carried the question to this extent, and the rule may be said to be that when, during the continuance of the employment, a danger arises from the negligence of the employer, remaining at work under fear of discharge is not, as a matter of law, an assumption of the risk. Authority on the subject for the most part consists of *dicta*.

Thus, in England, a plaintiff, employed as a teamster, was required during his employment to drive a vicious horse furnished him after he entered the service. It was held that, although he knew and appreciated the danger, continuing at work was not, as a matter of law, a voluntary assumption of the risk; and Lindley, L. J., said: "If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed (512)

to take the risk, and had not acted voluntarily in * * * taking the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred.”⁵⁶

So, in *Massachusetts* it was said: “If the servant is acting within the scope of his regular employment or in obedience to special orders, the fear of losing his place may take away his choice so far that he cannot be said freely to take the risk upon himself.”⁵⁷ But

⁵⁶ *Yarmouth v. France*, 19 Q. B. Div. 647. See, also, *Thrussell v. Handyside*, 20 Q. B. Div. 359, 364. But see, contra, *Bramwell, B.*, in *Ogden v. Rummens*, 3 Fost. & F. 751; *Woodley v. Metropolitan Ry. Co.*, 46 Law J. Exch. 521; *infra*, § 114a.

⁵⁷ *Mellor v. Merchants' Mfg. Co.*, 150 Mass. 362, 364.

But in *Haley v. Case*, 142 Mass. 316, 321, it was said, though the case did not decide it: “As the plaintiff was of full age, and an experienced teamster, if the danger of driving the horses with the van under the gateway was well known to him, he cannot recover, although he was acting under the immediate personal direction of Dodge. The fear of the plaintiff that he would be discharged from his employment if he did not obey the orders of Dodge, his employer, would not justify him in running a risk which was well known to him, and then, if injured, in recovering damages from his employer.”

In *Wescott v. New York & N. E. R. Co.*, 153 Mass. 460, the court held the plaintiff guilty of contributory negligence, but said: “If, knowing that the service was dangerous, he undertook it under the order of his superior through fear of losing his position if he refused, he must be held to have assumed the risk.”

In *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, “not assumed under such constraint of any kind as deprives the act of its voluntary character.”

The question was not raised in *Davis v. Forbes*, 171 Mass. 548, but Knowlton, J., dissenting, said of the rule that continuance at work, knowing and appreciating the danger, was, as a matter of law, an assumption of the risk, “This rule bears rather hard upon employes, for, ex hypothesi, the employer is primarily in the wrong, and practically the employe has no alternative but to abandon his contract and quit the service, even though that might mean starvation for his

in a recent case, where the plaintiff had been employed many years, and about a year before the accident new racks for holding hatchets were put in, and, complaining that the hatchets were more likely to fall off and injure him than when the old racks were in use, he "was notified that he could go if he would not face the chance. He stayed and took the risk. * * * He did so none the less that the fear of losing his place was one of his motives."⁵⁸ The nature of the risk, together with the doubt whether the defendant was negligent, and especially the long continuance of the plaintiff in service, justified the court in ruling, as a matter of law, that the risk was assumed, without necessarily passing upon the weight to be given his fear of discharge.

In Indiana, also, fear of discharge would not prevent the application of the rule that continuance in service with knowledge and appreciation of the danger is an assumption of the risk.⁵⁹

family. His remedy by a suit upon his contract would be costly and uncertain, and the damages recoverable would be small." In this case the plaintiff was injured by a defective stirrup leather furnished him the first day of his employment. It did not appear upon what terms he was employed. *Infra*, § 114b.

⁵⁸ *Lamson v. American Axe & Tool Co.*, 177 Mass. 144 (Court).

⁵⁹ See *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151. See, also, *Sweeney v. Berlin & J. Envelope Co.*, 101 N. Y. 520 (machine upon which plaintiff worked was dangerous, and he objected. The master "might call upon the servant to perform his stipulated service, and discharge him if it was withheld. A threat to do so is not coercion. Here there was nothing more. Under such circumstances, there is no ground for charging the defendant with negligence, or throwing upon it a risk assumed by the plaintiff when he took employment"); *Galveston, H. & S. A. Ry. Co. v. Drew*, 59 Tex. 10 (plaintiff's objection to using defective machinery within the scope of his (514)

If the plaintiff is not induced to obey or to remain at work by fear of discharge, the general rule applies, and his recovery is barred.⁶⁰

§ 108. Contributory negligence.

If the servant is guilty of negligence in the use of the places, machinery, or materials furnished to him, it is unnecessary to inquire whether the master has been negligent or not.

The court, looking at the plaintiff's conduct, may find as a matter of law that he was negligent, or may submit the question of his negligence to the jury; and in either case a finding of negligence on the part of the plaintiff bars his recovery, whether or not the defendant has failed in any duty towards him. However great care a master may use in furnishing safe places or materials for the work, he cannot prevent injuries through the servant's careless use of them; and, even if the master has himself been negligent, he is not to be held responsible when the servant's own negligence is the proximate cause of the injury. In cases of this class the courts often decide against the right to recover by saying that the servant "assumed the risk" of injury, instead of stating that he was negligent or guilty of contributory negligence, which is the true ground of decision.⁶¹ Thus, it is said: "If a party selects a danger-

employment is of no avail); *Atchison, T. & S. F. R. Co. v. Schroeder*, 47 Kan. 315 (ordered to lift heavy rails without assistant; risk assumed though fear of discharge); *Kean v. Detroit C. & B. R. Mills*, 66 Mich. 277 (ordered to clean rolls; takes obvious risks); *Jackson v. Georgia Railroad*, 77 Ga. 82 (ordered to climb defective derrick; not assumed if fear of discharge); *infra*, § 114c.

⁶⁰ *Lewis v. New York & N. E. R. Co.*, 153 Mass. 73, 77.

⁶¹ *Supra*, §§ 82, 84, 86. It is often unnecessary to distinguish. "Whether it be said that the plaintiff took the risk, or that he was

ous way to perform a duty when there is a safe way, knowing the way selected to be dangerous, or if the danger is 'apparent' or 'obvious,' then he assumes the risk and is guilty of contributory negligence,"⁶²—rather a confusing way of stating that every person is bound, under the circumstances in which he is placed, to exercise the care of a reasonably prudent man to avoid injury. Whether he fails to exercise this care deliberately or heedlessly is unimportant.

The ways in which a servant may fail to use due care are infinite, and only the most general divisions can profitably be made. Thus, a servant may be guilty of negligence in entering or remaining in dangerous places, as when a miner sits down under a shattered roof,⁶³ or returns when an explosion is expected.⁶⁴ So, car repairers starting to work without giving warning or putting out flags may be negligent;⁶⁵ railroad employes attempting to cross tracks in front of or between moving

negligent, or that the defendant's negligence was not the proximate cause of the injury, the result must be that the plaintiff cannot recover." *Keenan v. Edison Electric Illuminating Co.*, 159 Mass. 379.

⁶² *Tennessee C., I. & R. Co. v. Herndon*, 100 Ala. 451. As to knowledge, see *Mahoney v. Metropolitan R. Co.*, 104 Mass. 73 (obstruction in highway); *Dewire v. Bailey*, 131 Mass. 169 (icy sidewalk).

⁶³ *Bunt v. Sierra Butte G. M. Co.*, 138 U. S. 483 (Court); *Colorado Coal & Iron Co. v. Carpita*, 6 Colo. App. 248 (Court).

⁶⁴ *Davis v. Graham*, 2 Colo. App. 210. See, also, *Colorado Fuel & Iron Co. v. Cummings*, 8 Colo. App. 541.

⁶⁵ *Chicago, B. & Q. R. Co. v. McGraw*, 22 Colo. 363 (Jury); *O'Rourke v. Union Pac. Ry. Co.*, 22 Fed. 189 (Court); *Northern Cent. Ry. Co. v. Herchiskel* (C. C. A.) 74 Fed. 460; *Whitcomb v. McNulty* (C. C. A.) 105 Fed. 863 (Court); *Southern Pac. Co. v. Pool*, 160 U. S. 438 (Court); *Cloutier v. Grafton & U. R. Co.*, 162 Mass. 471; *Nihial v. New York, N. H. & H. R. Co.*, 167 Mass. 52 (Court).

cars;⁶⁶ or brakemen jumping from cars without looking to see where they will land,⁶⁷ may not be in the exercise of care. Riding on the cowcatcher of a locomotive is negligence;⁶⁸ but, as a brakeman's duty calls him to the top of cars, the manner in which he rides there generally raises a question for the jury.⁶⁹ In coupling

⁶⁶ *Stewart v. Pennsylvania Co.*, 130 Ind. 242; *Salem Stone & Lime Co. v. Griffin*, 139 Ind. 141; *Sheets v. Chicago & I. C. Ry. Co.*, 139 Ind. 682; *Alabama G. S. R. Co. v. Richie*, 111 Ala. 297 (Court); *Tennessee C., I. & R. Co. v. Hansford*, 125 Ala. 349. See *Whatley v. Zenida Coal Co.*, 122 Ala. 118; *Lord v. Pueblo S. & R. Co.*, 12 Colo. 390 (Court); *Griffin v. Boston & A. R. Co.*, 148 Mass. 143; *Whitmore v. Boston & M. R. R.*, 150 Mass. 477; *Sullivan v. Old Colony R. Co.*, 153 Mass. 118 (Court); *Horne v. Old Colony R. Co.*, 161 Mass. 180 (Court); *Murray v. Pitchburg R. Co.*, 165 Mass. 448; *Foss v. Old Colony R. Co.*, 170 Mass. 168 (Court); *Chicago & N. W. Ry. Co. v. Davis (C. C. A.)* 53 Fed. 61 (Court); *Weiss v. Bethlehem Iron Co. (C. C. A.)* 88 Fed. 23; *Bethlehem Iron Co. v. Weiss (C. C. A.)* 100 Fed. 45; *Grand Trunk Ry. Co. v. Baird (C. C. A.)* 94 Fed. 946 (Court); *Mexican Cent. Ry. Co. v. Jones (C. C. A.)* 107 Fed. 64 (Jury); *Elliott v. Chicago, M. & St. P. Ry. Co.*, 150 U. S. 245 (Court); *Texas & Pac. Ry. Co. v. Gentry*, 163 U. S. 353; *Louisville & N. R. Co. v. Thornton*, 117 Ala. 274 (brakeman, being struck, staggered and was run over); *Louisville & N. R. Co. v. Smith (Ala.)* 30 So. 571 (failing to watch for and obey signals).

⁶⁷ *Brown v. Ohio & M. Ry. Co.*, 138 Ind. 648; *Burgin v. Louisville & N. R. Co.*, 97 Ala. 274 (Court); *Babcock v. Old Colony R. Co.*, 150 Mass. 467; *Thompson v. Boston & M. R. R.*, 153 Mass. 391 (Court); *Donahue v. Boston & M. R. R. (Mass.)* 59 N. E. 663 (Jury); *H. C. Akeley Lumber Co. v. Rauen (C. C. A.)* 58 Fed. 668; *Dacey v. Old Colony R. Co.*, 153 Mass. 112 (attempting to get on moving car at night); *Sweat v. Boston & A. R. Co.*, 156 Mass. 284 (running along platform at night, injured by loose board).

⁶⁸ *Kresanowski v. Northern Pac. R. Co.*, 18 Fed. 229 (Court); *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439 (Court); *Coyle v. Pittsburgh, C., C. & St. L. Ry. Co.*, 155 Ind. 429 (Court). See *Lockhart v. Little Rock & M. R. Co.*, 40 Fed. 631.

⁶⁹ *Schlaff v. Louisville & N. R. Co.*, 100 Ala. 377 (Court); *Jones v. Alabama M. R. Co.*, 107 Ala. 400; *Au v. New York, L. E. & W. R.*

cars a servant may be negligent not only in disobeying rules established for his safety,⁷⁰ but by failing to notice the construction of the cars, standing in the wrong place, or attempting to make the coupling while the cars are in motion.⁷¹

When there are several ways by which the plaintiff may go, and he takes the more dangerous one, he may be negligent.⁷² Thus, if, instead of walking upstairs,

Co., 29 Fed. 72; *Oregon Short Line & U. N. Ry. Co. v. Tracy* (C. C. A.) 66 Fed. 931; *Goff's Adm'r v. Norfolk & W. R. Co.*, 36 Fed. 299 (Court); *Martin v. Baltimore & O. R. Co.*, 41 Fed. 125 (Court); *St. Louis & S. F. Ry. Co. v. Schumacher*, 152 U. S. 77 (Court).

⁷⁰ *Infra*, § 109.

⁷¹ *Louisville & N. R. Co. v. Ward* (C. C. A.) 61 Fed. 927; *Lake Erie & W. Ry. Co. v. Craig* (C. C. A.) 73 Fed. 642; *George v. Clark* (C. C. A.) 85 Fed. 608; *Morris v. Duluth, S. S. & A. Ry. Co.* (C. C. A.) 108 Fed. 747; *Tuttle v. Detroit, G. H. & M. Ry.*, 122 U. S. 189; *Northern Pac. R. Co. v. Everett*, 152 U. S. 107; *Chicago & E. R. Co. v. Wagner*, 17 Ind. App. 22; *Pittsburgh, C. C. & St. L. Ry. Co. v. Elwood*, 25 Ind. App. 671; *Louisville, N. A. & C. Ry. Co. v. Buck*, 116 Ind. 566; *Davis v. Western Ry. Co.*, 107 Ala. 626 (Court); *George v. Mobile & O. R. Co.*, 109 Ala. 245 (Court); *Western Railway v. Williamson*, 114 Ala. 131; *Southern Ry. Co. v. Arnold*, 114 Ala. 183; *McDonald v. Alabama M. Ry. Co.*, 123 Ala. 227 (Court); *Lothrop v. Fitchburg R. Co.*, 150 Mass. 423 (Court); *Boyle v. New York & N. E. R. Co.*, 151 Mass. 102 (Court); *Hannah v. Connecticut River R. Co.*, 154 Mass. 529 (Court); *Graham v. Boston & A. R. Co.*, 156 Mass. 4; *Browne v. New York & N. E. R. Co.*, 158 Mass. 247 (Court); *Goodes v. Boston & A. R. Co.*, 162 Mass. 287; *Larkin v. New York Cent. & H. R. R. Co.*, 166 Mass. 110 (Court).

⁷² *Columbus & W. Ry. Co. v. Bradford*, 86 Ala. 574; *Tennessee C., I. & R. Co. v. Herndon*, 100 Ala. 451; *Galvin v. Old Colony R. Co.*, 162 Mass. 533 (Court); *Houlihan v. Connecticut River R. Co.*, 164 Mass. 555 (walking along track); *Welch v. New York, N. H. & H. R. Co.*, 176 Mass. 393 (standing on track); *Murphy v. City Coal Co.*, 172 Mass. 324 (going to dangerous place to see why machine does not work); *Cunningham v. Chicago, M. & St. P. R. Co.*, 17 Fed. 882; *Nyback v. Champagne Lumber Co.* (C. C. A.) 90 Fed. 774; *Cushman v. Cushman* (Mass.) 61 N. E. 262.

he prefers to take a defective elevator, he cannot recover.⁷³

If the servant may choose his own method of doing the work, he must use due care. Thus, where he adopted his own method of blasting,⁷⁴ or where he chose to clean windows by rigging a tackle outside, when he could have done it equally well within,⁷⁵ he cannot recover. He cannot recover when his injury is brought about by the misuse of machinery, as using a switch as a step to board a moving car,⁷⁶ or by failing to use machinery with due care.⁷⁷ So, if he gropes about a vessel in the

⁷³ *Sievers v. Peters B. & L. Co.*, 151 Ind. 642 (Court); *McGonigle v. Kane*, 20 Colo. 292; *Patterson v. Hemenway*, 148 Mass. 94 (Court).

⁷⁴ *Mulligan v. McAlpine*, 15 Rettie, Ct. Sess. Cas. (4th Ser.) 789 (Court).

⁷⁵ *Erskine v. Chino Valley B. S. Co.*, 71 Fed. 270 (Court); *Goodlett v. Louisville & N. Railroad*, 122 U. S. 391 (Court: Sending car into cut without giving warning).

⁷⁶ *Richmond & D. R. Co. v. Bivins*, 103 Ala. 142 (Court); *The Sir Garnet Wolseley*, 41 Fed. 896 (Court); *Anderson v. The Ashebrooke*, 44 Fed. 124 (Court).

⁷⁷ *Topham v. Goodwin* (Nov. 5, 1881) 72 Law T. 10 (Court: Packing moving saw); *Warren v. Bates* (Oct. 14, 1882) 73 Law T. 400 (Court: Putting weights on safety valve); *Peirce v. Oliver*, 18 Ind. App. 87 (Court: Jackscrew); *Arcade File Works v. Juteau*, 15 Ind. App. 460 (trying to run machine of which he is ignorant); *Morewood Co. v. Smith*, 25 Ind. App. 264 (Court: Caught in cogs); *Lafayette Carpet Co. v. Stafford*, 25 Ind. App. 187 (Court: Yarn drew plaintiff's hand in); *Day v. Cleveland, C., C. & St. L. Ry. Co.*, 137 Ind. 206 (Court: Removing support from board, which fell); *Campbell v. Lunsford*, 83 Ala. 512 (Court: Stepping on support of undermined wall); *The Privateer*, 14 Fed. 872 (Court: Using temporary and unsafe ladder); *Smith v. Memphis & L. R. Co.*, 18 Fed. 304 (excessive speed on defective track); *The John B. Lyon*, 33 Fed. 184 (seaman injured by wheel he had wrongfully unlashed); *Grant v. Union Pac. Ry. Co.*, 45 Fed. 673 (attempting to board moving engine); *Aiken v. Smith* (C. C. A.) 54 Fed. 896 (Court: Throw-

dark, when he might have got a light, he cannot recover for falling through an open hatch.⁷⁸

ing rope off moving drum); *Gowen v. Harley* (C. C. A.) 56 Fed. 973 (Court: Method of lifting box); *Southern Pac. Co. v. Johnson* (C. C. A.) 69 Fed. 559 (engineer going out on running board); *McCain v. Chicago, B. & Q. R. Co.* (C. C. A.) 76 Fed. 125 (Court: Placing hand on steel slivers); *McGough v. Ropner*, 87 Fed. 534 (Court: Working beneath open hatch); *Washington & G. R. Co. v. McDade*, 135 U. S. 554 (putting belt on pulley); *Ayres v. Bull*, 5 Times Law R. 202 (Court: Going down steps hurriedly in high-heeled shoes); *Muligan v. McAlpine*, 15 Rettie, Ct. Sess. Cas. (4th Ser.) 789 (Court: Striking match near powder); *Felch v. Allen*, 98 Mass. 572 (use of elevator); *Rock v. Indian Orchard Mills*, 142 Mass. 522 (boy playing with machine); *White v. Nonantum Worsted Co.*, 144 Mass. 276 (noticing working of machine); *Moynihan v. Hills Co.*, 146 Mass. 586 (breaking of machine); *Glover v. Dwight Mfg. Co.*, 148 Mass. 22 (cleaning machine); *Carey v. Arlington Mills*, 148 Mass. 338 (falling into elevator well); *Probert v. Phipps*, 149 Mass. 258 (Court: Caught in gearing); *Daley v. American Printing Co.*, 150 Mass. 77 (caught in set screw); *Murphy v. Webster*, 151 Mass. 121, 156 Mass. 48 (Court: Getting arm in way of elevator); *Perry v. Smith*, 156 Mass. 340 (Court: Plumber setting fire to box soaked with oil); *Henry v. King Philip Mills*, 155 Mass. 361 (Court: Cleaning engine); *Marnin v. Kitson Mach. Co.*, 159 Mass. 156 (Court: Taking load off elevator); *Cluny v. Cornell Mills*, 160 Mass. 218 (Court: Failing to use guard for saw); *Kilroy v. Foss*, 161 Mass. 138 (Court: Getting under stone raised by derrick); *Cunningham v. Merrimac Paper Co.*, 163 Mass. 89 (Court: Lifting defective door); *Wilson v. Steel Edge S. & R. Co.*, 163 Mass. 315 (Court: Feeding circular saw by hand); *Degnan v. Jordan*, 164 Mass. 84 (Court: Going under defective elevator); *Willey v. Boston Electric Light Co.*, 168 Mass. 40 (turning on defective light); *Powers v. Boston & M. R. R.*, 175 Mass. 466 (mounting defective engine); *Grimaldi v. Lane*, 177 Mass. 565 (Jury: Using iron scraper to unload, missed hole); *Haskell v. Cape Ann Anchor Works* (Mass.) 59 N. E. 1113 (Jury: Getting under weight supported by new chain); *Victor Coal Co. v. Muir*, 20 Colo. 320 (failing to prop mine).

⁷⁸ *The Saratoga*, 87 Fed. 349 (Court); *Taylor v. Carew Mfg. Co.*, 143 Mass. 470 (Court); *Murphy v. Greeley*, 146 Mass. 196 (Court). See, also, *The Carl*, 18 Fed. 655 (Court); *Learoyd v. Godfrey*, 138 Mass. 315; *Watts v. Boston Tow-Boat Co.*, 161 Mass. 378 (Court).

If the plaintiff is exposed to sudden and unexpected danger, he is not always to be held responsible for acting wildly or without judgment.⁷⁹ Also, "it can hardly be expected that workmen will not move a little while they are engaged about their work; and if they are exposed to danger from defective machinery, of which they are unaware, the question is whether they were in a position such as, without carelessness, they might be reasonably and naturally expected to occupy, and not improper for a person so employed."⁸⁰

§ 109. Disobedience of rules.

Failure to obey rules established by the master for the safety of the servant is contributory negligence when the rules are known to the servant and enforced by the master.

The plaintiff is bound to obey the rules established by his master relating to the conduct of the business, and they become part of the contract of service;⁸¹ if he disobeys them, it may be said that he is acting out of the scope of his employment,⁸² though ordinarily, in such case, he is held guilty of contributory negligence.⁸³

⁷⁹ *McCauley v. Tennessee C., I. & R. Co.*, 93 Ala. 357; *Stevenson v. Chicago & A. R. Co.*, 18 Fed. 493.

⁸⁰ *Hackett v. Middlesex Mfg. Co.*, 101 Mass. 101, 104.

⁸¹ *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Cincinnati, I., St. L. & C. Ry. Co. v. Lang*, 118 Ind. 579; *Louisiana, N. A. & C. Ry. Co. v. Heck*, 151 Ind. 292; *Crew v. St. Louis, K. & N. W. Ry. Co.*, 20 Fed. 87. See *Denver, T. & Ft. W. R. Co. v. Smock*, 23 Colo. 456, (examination of cars for defects; brakeman an expert). As to the master's duty in regard to rules, see *supra*, § 69.

⁸² *Richmond & D. R. Co. v. Finley (C. C. A.)* 63 Fed. 228 (coupling cars).

⁸³ *Pryor v. Louisville & N. R. Co.*, 90 Ala. 32 (coupling cars); *Richmond & D. R. Co. v. Free*, 97 Ala. 231 (coupling cars); *Richmond & D. R. Co. v. Thomason*, 99 Ala. 471 (coupling cars); *Louis-*

But to urge this defense it must appear that the servant knew the rules,⁸⁴ and it must further appear that the defendant caused them to be observed, and that they had not become a dead letter.⁸⁵ When the rule is habitually violated by the employes, in order to relieve the plaintiff from the charge of negligence in disobeying it he must show that the violation was of long duration and at the time known to him.⁸⁶

ville & N. R. Co. v. Markee, 103 Ala. 160 (signals); Louisville & N. R. Co. v. Stutts, 105 Ala. 368 (running engine improperly); Alabama G. S. R. Co. v. Richie, 111 Ala. 297 (coupling cars); Sanders v. McGhee, 114 Ala. 373 (coupling cars); Brooks v. Northern Pac. R. Co., 47 Fed. 687 (examination); Central Trust Co. v. East Tennessee, V. & G. Ry. Co., 69 Fed. 353 (riding on cars); Kansas & A. V. Ry. Co. v. Dye (C. C. A.) 70 Fed. 24; Gleason v. Detroit, G. H. & M. Ry. Co. (C. C. A.) 73 Fed. 647; Wabash & W. Ry. Co. v. Morgan, 132 Ind. 430 (coupling cars); Louisville, E. & St. L. C. R. Co. v. Utz, 133 Ind. 265 (examination of brakes, etc.); Last Chance Mining & Milling Co. v. Ames, 23 Colo. 167 (riding on car with more men than permitted); Wescott v. New York & N. E. R. Co., 153 Mass. 460 (running of train).

⁸⁴ Louisville & N. R. Co. v. Hawkins, 92 Ala. 241; Memphis & C. R. Co. v. Askew, 90 Ala. 5 (coupling cars); Brown v. Louisville & N. R. Co., 111 Ala. 275 (coupling cars); Alabama M. Ry. Co. v. McDonald, 112 Ala. 216; Georgia Pac. Ry. Co. v. Davis, 92 Ala. 300; Indiana, I. & I. R. Co. v. Bundy, 152 Ind. 590; Flutter v. New York, C. & St. L. R. Co. (Ind. App.) 59 N. E. 337; McGhee v. Campbell (C. C. A.) 101 Fed. 936 (using handcar); Dunlap v. Northeastern R. Co., 130 U. S. 649; Pittsburgh R. Co. v. Martin (Ind. Sup.) 61 N. E. 229.

⁸⁵ Hissong v. Richmond & D. R. Co., 91 Ala. 514; Richmond & D. R. Co. v. Hissong, 97 Ala. 187 (coupling cars); Louisville & N. R. Co. v. Richardson, 100 Ala. 232.

⁸⁶ Louisville & N. R. Co. v. Mothershed, 110 Ala. 143; Alabama G. S. R. Co. v. Roach, 110 Ala. 266; Northern Pac. R. Co. v. Nickels (C. C. A.) 50 Fed. 718; Lake Erie & W. R. Co. v. Craig (C. C. A.) 80 Fed. 488; Knickerbocker Ice Co. v. Finn (C. C. A.) 80 Fed. 483; Cleveland, C., C. & St. L. Ry. Co. v. Baker (C. C. A.) 91 Fed. 224. See Thain v. Old Colony R. Co., 161 Mass. 353.

The defendant, having established rules and regulations, must provide some safe and practicable means or opportunity of obeying them, and if, through failure in this regard, the plaintiff is unable to act in accordance with them, he cannot be charged with negligence.⁸⁷ The violation of the rules by the plaintiff must, moreover, be the proximate cause of the injury.⁸⁸

The master, or a servant with authority for the purpose, may waive the rules or regulations;⁸⁹ but, unless the superior giving the order is invested with such authority, it would seem that the servant, by obedience to him, runs the risk of being charged with negligence for violation of them.⁹⁰

§ 110. Temporary orders.

Within the scope of the employment, and during its continuance, the servant is bound to perform the duties for which he was hired, and the master is bound to refrain from giving him negligent orders concerning the work, and, where the nature of the work requires it, must warn or protect the servant from danger.

If the master's directions expose the servant to danger, he

⁸⁷ *Memphis & C. R. Co. v. Graham*, 94 Ala. 545; *Chicago, St. L. & P. R. Co. v. Fry*, 131 Ind. 319.

⁸⁸ *Ford v. Fitchburg R. Co.*, 110 Mass. 240 (running engine); *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211 (examining cars, etc.); *Louisville & N. R. Co. v. Ward* (C. C. A.) 61 Fed. 927 (coupling cars); *Terre Haute & I. R. Co. v. Mansberger* (C. C. A.) 65 Fed. 196.

⁸⁹ *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Finley v. Richmond & D. R. Co.*, 59 Fed. 419.

⁹⁰ *Russell v. Richmond & D. R. Co.*, 47 Fed. 204. See, also, *Powers v. Boston & M. R. R.*, 153 Mass. 188; *Atchison, T. & S. F. R. Co. v. Reesman* (C. C. A.) 60 Fed. 370.

may, by voluntary assumption of the risk or contributory negligence, bar recovery for the resulting injury.

The master is under a continuing duty to exercise care towards his servant in the conduct of his work, and if he gives negligent orders, or sends the plaintiff into danger without warning, or requires work which will expose the servant to injury unless he is protected, and the master fails to care for him, the servant may recover. The master has a right to require of the servant the stipulated services, and to discharge him if he refuse to obey,⁹¹ but the servant may not obey an order exposing him to manifest dangers which an ordinarily prudent man would not encounter, without being guilty of negligence, unless under such peculiar circumstances of exigency as would justify him in complying.⁹²

Order to hurry.

Telling a servant to work "quick" at a machine is not negligence, and does not permit him to fail in exercising ordinary care to prevent injury from the work.⁹³ "It was most pressed that the master confused and drove the plaintiff forward into the danger by saying, with an oath, 'You won't get that rope fast,' just as the rope

⁹¹ *Sweeney v. Berlin & J. Envelope Co.*, 101 N. Y. 520. See *Bowes v. Press* [1894] 1 Q. B. 202. See, on fear of discharge, *supra*, § 107, and cases cited.

⁹² *Last Chance Min. & Mill. Co. v. Ames*, 23 Colo. 167.

⁹³ *Wanner v. Kindel*, 4 Colo. App. 168; *Russell v. Tillotson*, 140 Mass. 201; *Taylor v. Carew Mfg. Co.*, 140 Mass. 150; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182; *Ruchinsky v. French*, 168 Mass. 68; *Northern Pac. R. Co. v. Egeland*, 163 U. S. 93. See, also, *Wright v. Southern Ry. Co.*, 80 Fed. 260; *Kansas & T. Coal Co. v. Reid* (C. C. A.) 85 Fed. 914; *Great Northern Ry. Co. v. Kasischke* (C. C. A.) 104 Fed. 440; *Henderson v. Boynton*, 173 Mass. 217.

began to render,—that is, to slip on the cleat by jerks because of the strain upon it. But these words carried no specific or wrong direction as to the manner in which the plaintiff should act. They did not forbid his letting the rope go to get more slack, if that was proper. And we cannot think that a jury would be warranted in finding that an oath addressed to a sailor who knew what to do was sufficient to shift the responsibility for a misstep.”⁹⁴

Duty of warning when nature of work requires it.

The plaintiff may properly be directed to undertake some hazardous service within the scope of the duties he is hired to perform, and he is bound by his agreement to obey the order. But if the order places him in a position of danger, or sends him into places where there is danger known to the master and not to him, the employer is guilty of negligence if he fails to warn of the risk or guard him against it. The plaintiff may rely on the master's care in this respect, and is not bound carefully to inspect every machine he is told to use or place where he is sent. Thus, it is negligence for the master to send the plaintiff upon a dangerous pile of lumber without warning, and the servant is not bound to inspect it before obeying.⁹⁵ So, where he is directed to work under an overhanging rock, and is told that

⁹⁴ *Williams v. Churchill*, 137 Mass. 243, 245; *Coyne v. Union Pac. Ry. Co.*, 133 U. S. 370.

⁹⁵ *Millard v. West End St. Ry. Co.*, 173 Mass. 512 (Jury); *McCoy v. Inhabitants of Westborough*, 172 Mass. 504 (Jury: Superintendent standing near crack of trench caused it to cave); *Gagnon v. Seaconnet Mills*, 165 Mass. 221 (Jury: Told to sit on truck loaded with timber); *Southern Ry. Co. v. Shields*, 121 Ala. 460 (Jury: Ordered to stop cars in unusual way).

it is safe.⁹⁶ The duty of warning does not exist where the risk is obvious and the plaintiff may protect himself.⁹⁷

The nature of the work which the plaintiff is hired to do, or the character of the service he temporarily performs, may not expose him to danger unless the master fails to take precautions; and in such case the master owes him the duty of protection during the work, and the plaintiff may rely upon the duty being performed. Thus, where a track repairer was hurt, it was said: "The defendant had put the plaintiff in a position in which the more closely he attended to his duty the less he was able to be on the watch, and had put a foreman there for the express purpose of warning him. Under such circumstances the jury might well say that the plaintiff was justified in relying on the foreman's doing what the defendant admitted that he was

⁹⁶ *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71 (Jury); *Dona-hoe v. Old Colony R. Co.*, 153 Mass. 356 (Jury: Warning of defective car); *Hawkins v. Johnson*, 105 Ind. 29 (that way under shaft has been raised); *Cleveland, C., C. & St. L. Ry. Co. v. Brown* (C. C. A.) 56 Fed. 804 (should warn that supports of roof had been removed); *Northwestern Fuel Co. v. Danielson* (C. C. A.) 57 Fed. 915 (Jury: Removed supports of trestle without warning); *Hauss v. Lake Erie & W. R. Co.* (C. C. A.) 105 Fed. 733 (Jury: Should warn when track is being repaired). See, also, *supra*, §§ 63, 105.

⁹⁷ *Russell v. Tillotson*, 140 Mass. 201 (Court: Ordered to repair belt box, and caught in shaft); *Wescott v. New York & N. E. R. Co.*, 153 Mass. 460 (Court: Obeying order to proceed with train, knowing another due); *Haley v. Case*, 142 Mass. 316 (Jury: Ordered to drive, ran under a low sign); *Ogden v. Rummens*, 3 Fost. & F. 751 (Jury: Ordered to shore up an arch, which fell); *Thompson v. Chicago, M. & St. P. Ry. Co.*, 14 Fed. 564 (Jury: Ordered to work on bank liable to cave); *Motey v. Pickle M. & G. Co.* (C. C. A.) 74 Fed. 155 (Court: Ordered to take brace from between slabs, which fell. See, also, *supra*, §§ 92, 85, 96

bound to do, and said that he did."⁹⁸ But it must appear that the defendant had in some way given the plaintiff a right to expect and to rely upon warning or protection in order to excuse him from using his eyes.⁹⁹

The character of the plaintiff's work may be so engrossing that his failure to guard against a danger which he knows cannot be considered negligent. "If the service to be performed by the plaintiff was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect or be prepared at all times to avoid it."¹⁰⁰

The plaintiff may obey the order or encounter the

⁹⁸ *Davis v. New York, N. H. & H. R. Co.*, 159 Mass. 532, 535 (Jury); *Maguire v. Fitchburg R. Co.*, 146 Mass. 379 (Jury: Implied assurance that track is clear); *Scullane v. Kellogg*, 169 Mass. 544 (Jury: Sent to bottom of elevator shaft, and foreman promised to warn); *Louisville, E. & St. L. C. Ry. Co. v. Hanning*, 131 Ind. 528 (Jury: Car repairer has right to warning); *G. H. Hammond Co. v. Mason*, 12 Ind. App. 469 (Jury: Customary to designate defective cars); *Baltimore & O. S. W. Ry. Co. v. Peterson* (Ind.) 59 N. E. 1044 (Jury: Track repairer); *Richmond & D. R. Co. v. Farmer*, 97 Ala. 141 (Jury: Watching switch when engine came without warning that he expected).

⁹⁹ *Lynch v. Boston & A. R. Co.*, 159 Mass. 536.

¹⁰⁰ *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441, 450; *Haley v. Case*, 142 Mass. 316, 323 (backing wagon under gateway); *Babcock v. Old Colony R. Co.*, 150 Mass. 467 (brakeman struck pile of sleepers near track); *Gustafsen v. Washburn & Moen Mfg. Co.*, 153 Mass. 468 (pushing car, fell in ditch); *Baltimore & O. & C. R. Co. v. Leathers*, 12 Ind. App. 544 (Jury: Brakeman, hurriedly called to loose brakes, injured by defective one); *Norman v. Wabash R. Co.* (C. C. A.) 62 Fed. 727 (Jury: Looking at marks on cotton bales, did not notice defective floor); *Kane v. Northern Central Ry. Co.*, 128 U. S. 91 (Jury: Brakeman noticed and reported loose step; immediately after, hurriedly going to set brakes, he forgot it).

risks through fear of discharge, and, when this motive appears, the better opinion seems to be that the question of his voluntary assumption of them should be submitted to the jury.¹⁰¹

§ 111. Reliance on care of master.

A servant has a right to rely upon the exercise of reasonable care by the master and his delegates in performing the obligations cast upon him.

Every man has a right to assume, unless he has notice to the contrary, that persons with whom he is brought in contact will exercise reasonable care under the circumstances not to do him injury, and he may govern his actions in accordance with this assumption. The same principle applies when, owing to the relation between them, certain obligations are cast upon one for the benefit of another; and a servant is not bound to anticipate that the master will fail to use due care in performing the duties owed by him.¹⁰² "Within the chosen sphere of mutual duty, during the progress of the employment, both employer and employe must be diligent, and co-operate to secure the employe against personal injury,—the employe to protect himself against all known and obvious dangers, and the employer to see to it that the instrumentalities furnished by him are reasonably safe and free from lurking and unexpected

• ¹⁰¹ Supra, § 107.

¹⁰² *Patterson v. Wallace*, 1 Macq. H. L. Cas. 748; *Smith v. Baker* [1891] App. Cas. 325; *Hough v. Railway Co.*, 100 U. S. 213; *Louisville, N. A. & C. Ry. Co. v. Sanford*, 117 Ind. 265; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441. See, also, *Daniel v. Metropolitan Ry. Co.*, L. R. 5 H. L. Sc. 45; *Fox v. Sackett*, 10 Allen (Mass.) 535. (528)

peril. The failure to perform this reciprocal duty is negligence."¹⁰³

The servant may properly rely upon the belief that the master will use due care in hiring competent workmen;¹⁰⁴ and when an employe is charged with the performance of the master's duty it may be assumed that he will exercise care in regard to it,¹⁰⁵ and that he will not adopt improper methods of work or select unsuitable materials,¹⁰⁶ and that, if he places the servant in a dangerous place, he will warn or protect him.¹⁰⁷ But this assumption does not relieve the plaintiff of the necessity of using reasonable care.¹⁰⁸

¹⁰³ *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 112. "It is his duty to use ordinary care in informing himself of the dangers and responsibilities attending his employment, and to take the same degree of care in avoiding accident and injury. This duty on his part is said to be correlative to the master's duty of employing a like measure of care for the servant's protection and safety. Moreover, the servant's duty in this regard, like that of his master, is a continuing one." *Wells v. Coe*, 9 Colo. 159, 166; *Union Pac. Ry. Co. v. Jarvi (C. C. A.)* 53 Fed. 65.

¹⁰⁴ *Summerhays v. Kansas Pac. Ry. Co.*, 2 Colo. 484; *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Chicago & Eastern I. R. Co. v. Beatty*, 13 Ind. App. 604.

¹⁰⁵ *Louisville & N. R. Co. v. Bouldin*, 121 Ala. 197; *Willey v. Boston Electric Light Co.*, 168 Mass. 40.

¹⁰⁶ *O'Driscoll v. Faxon*, 156 Mass. 527; *Gibson v. Sullivan*, 164 Mass. 557; *Powers v. City of Fall River*, 168 Mass. 60.

¹⁰⁷ *McCoy v. Inhabitants of Westborough*, 172 Mass. 504; *Murphy v. City Coal Co.*, 172 Mass. 324; *Millard v. West End St. Ry. Co.*, 173 Mass. 512; *Southern Ry. Co. v. Shields*, 121 Ala. 460; *Hauss v. Lake Erie & W. R. Co. (C. C. A.)* 105 Fed. 733. The plaintiff may expect that other servants will obey the master's regulations. See *Babcock v. Old Colony R. Co.*, 150 Mass. 467; *Sullivan v. Fitchburg R. Co.*, 161 Mass. 125. See, also, cases cited *supra*, § 110.

¹⁰⁸ *Alabama Great Southern R. Co. v. Roach*, 110 Ala. 266; *supra*, § 110.

The servant may assume that there are no defects in the machinery until he has or ought to have knowledge to the contrary.¹⁰⁹ Thus, where a brakeman riding on top of a car with his face to the rear was struck by a low bridge, it was held: "It was not negligent for him so to ride, although he knew there were low bridges under which the car must pass, because he had the right to suppose that the telltales would be in order, and in their proper position, and that he would, by means of their action, receive sufficient warning to enable him to avoid collision with bridges."¹¹⁰ He may likewise assume that the places where he is required to work are reasonably safe, and thus he may assume that a railroad has properly constructed its roadbed.¹¹¹

But the right to rely upon the care of the master or his delegates is of avail in determining the due care of the plaintiff only when the defect or danger is such that he is not himself bound to know it; and therefore, where the servant has an equal opportunity with the master to observe it, and is equally bound to observe it, he is guilty of negligence in failing to do so.¹¹²

§ 112. Equal opportunity to discover danger.

"While a servant may have an opportunity, he is not bound to make a critical examination of the condition of an implement or item of machinery before using it, to ascertain if it

¹⁰⁹ *Louisville & N. R. Co. v. Orr*, 91 Ala. 548; *Louisville & N. R. Co. v. Baker*, 106 Ala. 624.

¹¹⁰ *Maher v. Boston & A. R. Co.*, 158 Mass. 36, 44.

¹¹¹ *Union Pacific Ry. Co. v. O'Brien*, 161 U. S. 451.

¹¹² *Infra*, §§ 112, 113.

contains any latent defects, unless so required by the terms of his employment.”¹¹³

“An employe is held by the law to the use of ordinary care for his own safety; so that, if he voluntarily undertakes to do work attended with danger which is obvious, he impliedly assumes the risk involved in its execution. It does not follow, however, that he is guilty of negligence in working merely because he knows the work to be dangerous, without regard to the degree of danger and risk involved, nor unless it be of a degree which would ordinarily deter one of ordinary prudence from the undertaking. * * * In the matter of investigating a risk which is not plainly apparent in the nature of the work, the employer and employe do not always stand on the same footing, since the employe may to some extent rely upon the judgment of the employer, or of a superior in the same service.”¹¹⁴

“Where a defect is open and obvious to both master and servant, both will ordinarily be chargeable with notice of its existence. Where, however, the defect is latent, the master and servant are not equally chargeable with knowledge of its existence, although they may have equal opportunities to ascertain it. This is true for the very obvious reason that the duties resting upon them to search for or discover it are not the same. Both master and servant must exercise reasonable care; but reasonable care upon the part of the servant does not require of him an inspection to discover latent defects, while reasonable care upon the part of the master does require such inspection from him.”¹¹⁵

¹¹³ Louisville, E. & St. L. R. Co. v. Berry, 2 Ind. App. 427, 431.

¹¹⁴ Southern Ry. v. Guyton, 122 Ala. 231, 241.

¹¹⁵ Salem Stone & Lime Co. v. Tepps, 10 Ind. App. 516, 518; Louisville (531)

"The risk of the safety of the machinery is not assumed by an employe unless he knows the danger, or unless it is so obvious that he will be presumed to know it. He takes the risk of known or obvious dangers, and not of others. * * * The plaintiffs might well rely somewhat upon the expectation that the defendant would provide proper machinery for lowering them to their work, and they were not called upon to be over-strict in an examination into its safety."¹¹⁶

The servant has equal duty and equal opportunity to observe the defects and dangers in simple tools or instruments, like hoes, ladders, wrenches, and the like,¹¹⁷ and takes the risk of the dangers in using them. But this is not true of complicated machinery, about which he cannot be expected to know.¹¹⁸ So, as to dangers in places of work, he assumes only those which he is bound to discover and has opportunity to discover.¹¹⁹

ville, N. A. & C. Ry. Co. v. Buck, 116 Ind. 566; Pittsburgh, Cincinnati, C. & St. L. Ry. Co. v. Moore, 152 Ind. 345; Wells v. Coe, 9 Colo. 159, 163. See, also, Lawless v. Connecticut River R. Co., 136 Mass. 1; Haley v. Case, 142 Mass. 316; Lothrop v. Fitchburg R. Co., 150 Mass. 423.

¹¹⁶ Myers v. Hudson Iron Co., 150 Mass. 125, 134.

¹¹⁷ Burlington & C. R. Co. v. Liehe, 17 Colo. 280; American Carbon Co. v. Jackson, 24 Ind. App. 390.

¹¹⁸ King v. Ohio & M. Ry. Co., 14 Fed. 277 (Jury: Cars safe for coupling); Carpenter v. Mexican Nat. R. Co., 39 Fed. 315 (Jury: Defective brake); Chicago, R. I. & P. Ry. Co. v. Linney (C. C. A.) 59 Fed. 45 (Jury: Inspection of cars); Grace & Hyde Co. v. Kennedy (C. C. A.) 99 Fed. 679 (Jury: Rigging guy rope); Mason & O. R. Co. v. Yockey (C. C. A.) 103 Fed. 265 (Jury: Valves on engine); Tennessee Coal & Iron Co. v. Currier (C. C. A.) 108 Fed. 19 (Jury: Higher tramcar furnished); Bartholomeo v. McKnight (Mass.) 59 N. E. 804 (Jury: Unshored trench). See, as to improper loading of cars, James B. Clow & Sons v. Boltz (C. C. A.) 92 Fed. 572; cases cited *supra*, §§ 95, 96.

¹¹⁹ Johnson v. Oakes, 70 Fed. 566 (Court: Tackle falling from (532))

Where a plaintiff was injured by a defective foreign car which the defendant failed to inspect, an instruction that the plaintiff could not recover if he "knew, or by the exercise of ordinary care could have known, that it was the custom of the defendant company not to inspect cars that were brought in" under certain circumstances, was refused. The court held that the defendant was bound to inspect, and said: "No reason can be found for, and no authority exists supporting, the contention that an employe, either from his knowledge of the employer's methods of business or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished which contain defects that might have been discovered by reasonable inspection. The employer, on the one hand, may rely on the fact that his employe assumes the risks usually incident to the employment. The employe, on the other, has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred

house); *Mexican Cent. Ry. Co. v. Murray* (C. C. A.) 102 Fed. 264 (Jury: Defective bridge); *New York, N. H. & H. R. Co. v. O'Leary* (C. C. A.) 93 Fed. 737 (Jury: Guy stretched across track); *Smoot v. Mobile & M. Ry. Co.*, 67 Ala. 13 (duty to examine coupling); *Whalley v. Zenida Coal Co.*, 122 Ala. 118 (Jury: Defective tramway); *Kansas City, Ft. S. & M. R. Co. v. Kirksey* (C. C. A.) 60 Fed. 999 (duty to watch for signals); *Ervin v. Evans*, 24 Ind. App. 335 (Court: Taking down pulley). Where rule requires him to inspect brakes, etc., he is bound to do so. *Terre Haute & I. R. Co. v. Pruitt*, 25 Ind. App. 227. See cases cited *supra*, §§ 95, 96.

therefrom that danger of unsafe appliances might arise. * * * And whilst this does not justify an employe in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances."¹²⁰

The servant is bound always to use reasonable care to notice defects which may cause him injury, and be on his guard against them. Thus, where the plaintiff, while cleaning a machine at rest, was injured by its sudden starting, "she testified that she had never seen this machine start of itself, and did not know that it had ever done so, though she had seen other machines so start,—at least one other, upon which she was not working at the time. The fact that this had happened within her knowledge with other machines, equipped with other pulleys and belts, might or might not be deemed sufficient to put her on her guard. That would be for the jury to say."¹²¹ But in a case where the plaintiff was experienced in handling and packing bottles of beer, ale, and the like, and was injured by the explosion of a bottle of ale, two others having previously exploded, although he had never before seen it happen, he knew the danger and assumed the risk.¹²²

¹²⁰ *Texas & Pac. Ry. Co. v. Archibald*, 170 U. S. 665, 672.

¹²¹ *Donahue v. Drown*, 154 Mass. 21 (Jury); *Mooney v. Connecticut River Lumber Co.*, 154 Mass. 407 (Jury); *Anderson v. Duckworth*, 162 Mass. 251.

¹²² *Lehman v. Van Nostrand*, 165 Mass. 233 (Court); *Bessemer Land & Imp. Co. v. Dubose*, 125 Ala. 442 (Court: Vicious mule).

Making safe a defective machine or place.

“Laborers who were employed to aid in this effort [to make safe the roof of a mine] took upon themselves whatever of added risk might have come from the then situation of the entry. It is a most undoubted principle that, where a piece of property is out of repair, the men who are employed in making it safe take upon themselves whatever of added risk comes from the existing condition of the place or the work.”¹²³ Where the plaintiff was sent to repair a washed-out track, there was no duty to provide a safe place for him to work, since it was his duty to make it safe.¹²⁴ Some one has to be first in the place of danger, and a servant sent into a room where an explosion had occurred, and injured by a piece of iron falling upon him, cannot expect that it has been inspected, or rely upon the protection of any other person.¹²⁵

He is not to be exposed to other dangers than those he must reasonably expect to encounter. Thus, where the plaintiff was injured while repairing a machine, it was said: “Assuming that if the plaintiff was asked generally to examine the machine, and to repair it if he could, the defendant was not at fault as to the plaintiff by reason of any defect or danger connected with the whole apparatus. Yet, if the plaintiff was asked only to repair a specific part of the mechanism, it might be the defendant’s duty to warn him of a danger not ap-

¹²³ *Colorado Coal & Iron Co. v. Lamb*, 6 Colo. App. 255, 266; *Finlayson v. Utica Mining & Milling Co.* (C. C. A.) 67 Fed. 507 (earth falling in mine). See cases cited *supra*, §§ 95, 105.

¹²⁴ *Gulf, C. & S. F. Ry. Co. v. Jackson* (C. C. A.) 65 Fed. 48. See *supra*, § 105.

¹²⁵ *Kanz v. Page*, 168 Mass. 217.

parent, and when due to the improper working of some part of the apparatus distinct from that which he was asked to repair; as, for instance, to the creeping of the belt from the loose to the tight pulley."¹²⁶

§ 113. Assurances of safety.

Whether the servant knew and appreciated the risk to which he is exposed may be affected by assurances of safety given him by some superior. But such assurances are merely elements to be considered in determining the question, and do not of themselves prevent his assumption of the risk or permit him carelessly to expose himself to it.

If a danger is obvious, or such as a person of the plaintiff's capacity must have both known and appreciated, unless he recklessly refrained from noticing it, the court has no difficulty in finding the requisite knowledge and appreciation of danger from which inferences as to the plaintiff's assumption of it, or negligence in regard to it, may be drawn. When the danger is not of this character, the question which the court must determine is whether, in the exercise of due care, the plaintiff ought to have known and appreciated it; and, "in the matter of investigating a risk which is not plainly apparent in the nature of the work, the employe may to some extent rely upon the judgment of the employer, or of a superior in the same service."¹²⁷ Due care on his part does not require him to anticipate that the master has

¹²⁶ *Martineau v. National Plank Book Co.*, 166 Mass. 4. 10; *Cote v. Lawrence Mfg. Co.* (Mass.) 59 N. E. 656 (Jury: In a fire, plaintiff went under chimney and was injured by burning planks thrown down by another servant. As superintendent knew planks were so thrown, he ought to have warned).

¹²⁷ *Southern Railway v. Guyton*, 122 Ala. 231, 241; *supra*, §§ 94, 95. (536)

failed in his duty towards him, or furnished him with machinery or appliances, or sent him to places, that are less safe than they appear.¹²⁸ Nor does due care on his part always require him to disregard an assurance that the places or machinery are safe. This is an element to be considered.

“When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right. But if against this judgment is set the judgment of a superior, one, too, who, from the nature of the callings of the two men and of the superior’s duty seems likely to make the more accurate forecast, and if to this is added a command to go on with his work and to run the risk, it becomes a complex question, of the particular circumstances, whether the inferior is not justified as a prudent man in surrendering his own opinion and obeying the command. The nature and the degree of the danger, the extent of the plaintiff’s appreciation of it, and the exigency of the work, all enter into consideration, and no universal rule can be laid down.”¹²⁹ Thus, where the plaintiff was set to work under an overhanging rock, it appeared that he asked if it was safe, and the superintendent said: “Yes; it is all right. We tried to bar

¹²⁸ *Supra*, § 111.

¹²⁹ *McKee v. Tourtellotte*, 167 Mass. 69, 71 (defendant said ditch, which later caved, was all right); *Hennessy v. City of Boston*, 161 Mass. 502 (caving of trench); *Coan v. City of Marlborough*, 164 Mass. 206 (caving of trench); *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553 (boy sent to put belt on moving machinery might rely on foreman’s judgment that there was no danger). The master may expressly guaranty to take the risks, but this does not relieve the plaintiff of the necessity of using care. *Phillips v. Michaels*, 11 Ind. App. 672. See *Anderson v. Duckworth*, 162 Mass. 251.

down some rock, and it would not come." It was held that the question of the plaintiff's care in working where he did was for the jury.¹³⁰ In a later case the plaintiff, a boy, was injured by the breaking of a stirrup leather. He had noticed a bad place in the strap, and told Abbott, his foreman, that it did not look right. "Abbott took it out of his hand, got hold of it, and pulled it; that he then put in on the floor and pulled it up, and said it was strong enough to hold him, and that it had got to hold the plaintiff until he got a new one." The plaintiff further testified "that he believed the straps were strong enough after Abbott tested them and told him they were strong enough." The court held, as a matter of law, that the plaintiff knew and appreciated the risk. "There seems to have been what amounted to a common examination of the strap by the plaintiff and Abbott, and though the plaintiff relied to some extent, as was natural, on Abbott's judgment, he appears to have satisfied himself, from the test made, that the strap was suitable for use in the condition in which it was. * * * 'He believed the straps were strong enough after Abbott tested them and told him they were strong enough,' and evidently used them relying on what

¹³⁰ *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71; *Alabama G. S. R. Co. v. Davis*, 119 Ala. 572 (plaintiff knew of defective switch, but foreman told him it had been repaired); *Finlayson v. Utica Min. & Mill. Co.* (C. C. A.) 67 Fed. 507 (Court: Plaintiff working in shattered shaft, and injured by fall of earth which foreman had been unable to get down); *Haas v. Balch* (C. C. A.) 56 Fed. 984 (Jury: Plaintiff, working under overhanging bank, inquired if it was safe, and foreman, having investigated, said it was; not an equal means of knowledge, nor palpably dangerous); *Lehigh Valley R. Co. v. Kiszal* (C. C. A.) 80 Fed. 470 (Jury: Foreman would not permit plaintiff to draw fire under leaky boiler).

his own senses had told him concerning the test to which they were subjected, corroborated, as it was, by Abbott's statement that they were strong enough."¹³¹ The distinction between the two cases is brought out by the court, although in each the plaintiff may have been equally experienced in regard to the anticipated danger, and could assume that the master would furnish a reasonably safe place or appliance for the work required; yet in the latter case the plaintiff took the pains himself to investigate the danger, and, even though reasonable care might not have required this investigation on his part, yet it resulted in his satisfying himself that he could safely use the strap, and thus the assurances of his foreman merely corroborated his opinion. It would seem that the decision of the court was right upon the question of his knowledge and appreciation, and that the dissenting opinion, in saying: "No one can accurately estimate the strength of a piece of old leather from the appearance of it. He saw Abbott pull upon it, but he did not know how much force was applied in pulling. Probably he thought it was stronger than it proved to be,"—carries the question of appreciation to an unreasonable extent.

Both the reliance which a plaintiff may place on the master's care, and the assurances of safety which he may receive, are effectual only where the danger is not fully appreciated or obvious; and when it appears that the plaintiff did not in fact trust to his master's care or to these assurances, but investigated the risk himself

¹³¹ *Davis v. Forbes*, 171 Mass. 548; *Island Coal Co. v. Greenwood*, 151 Ind. 476 (coal fell from roof of mine which both plaintiff and foreman had tested and believed safe). See, also, *Rogers v. Leyden*, 127 Ind. 50.

and satisfied himself concerning it, he must be judged by the knowledge thus acquired, and can derive no benefit from the right which otherwise he may have had to rely upon his employer or some superior.

§ 114. Assumption of risk by continuance at work.

When, after entrance into the employment, an unforeseen danger arises through the failure of the master to perform a duty owed to the servant by virtue of the relation existing between them, the latter, by continuing at work with knowledge and appreciation of the risk, as matter of law, bars his recovery for the resulting injury; and his recovery is barred either on the ground of contributory negligence or voluntary consent to undertake the risk.

It is a rule, universally recognized, that when a person knowing and appreciating the dangers, and being free to encounter them or not, accepts employment where such dangers exist, he thereby waives any duty there may be in regard to them, and takes the risk of injury upon his own shoulders.¹³²

The rule is also well established that when, after acceptance of the employment, an unforeseen danger arises through the failure of the master to perform any of the duties secured to the servant by virtue of the relation existing between them, the breach of duty is waived, or the resulting injury brought about, by the servant's continuance in the employment, without inducement, knowing and appreciating the risk,¹³³ and consequently he cannot recover.

¹³² *Supra*, §§ 88, 92.

¹³³ Cases cited below. On this subject, see Charles Warren, 8 *Harv. Law Rev.* 457; Thomas Beven, 8 *Law Quart. Rev.* 202; C. B. Labatt, 32 *Am. Law Rev.* 57; 47 *Lawyers' Rep. Ann.* 161; Limberg (540)

The first class of cases was considered in the preceding chapter, and the rule was found to rest upon the application of the general principle, *Volenti non fit injuria*. Whatever duty may rest upon an occupier of premises containing an element of danger towards those whom he invites upon them, no duty can be imposed upon him in favor of one who, knowing, or in the exercise of due care being bound to know, the danger, voluntarily encounters it. In applying the rule the only fact which is in issue is the existence and extent of the plaintiff's knowledge and appreciation of the danger. He is held, as a matter of law, to know and appreciate all dangers of such character as a person of his capacity, knowledge, and experience would know and appreciate, unless he recklessly closed his eyes to them, and if, in fact, he did not know them, he must have been negligent in not informing himself. His act of accepting the employment is not in dispute, and since he is free to encounter the danger or not, as he chooses, his conduct leaves "no inference open but one,"—that of voluntary acceptance of the risk. This is a conclusion of law drawn from an admitted fact. It is to be observed that in this rule of contractual assumption of risks contributory negligence has no part. He is not guilty of contributory negligence in accepting the employment, although he may be negligent in failing to observe obvious dangers.¹³⁴

The rule in the second class of cases has not been based upon such satisfactory reasoning, and the deci-

v. *Glenwood Lumber Co.*, 49 L. R. A. 33, 127 Cal. 598; *Shearman & Redfield, Neg.* (5th. Ed.) §§ 208, 210, 211, 215.

¹³⁴ *Supra*, §§ 92, 95. As to pleading, see § 87.

sions are conflicting, both upon the theory of the rule and upon the extent to which a court may apply it without the aid of a jury. This confusion has, in the main, arisen from the careless use of the phrase "assumption of risk," as covering disabilities imposed at the time of accepting employment and defenses, not peculiar to master and servant law, which may prevent a plaintiff's recovery. The distinction between the two classes of cases is apparent. In the first, the plaintiff's conduct, though a waiver of a duty, is a waiver of a duty which has not been unperformed. By accepting service he does not waive any inchoate right of action, and his conduct simply dispenses with a duty which otherwise might exist. In the latter class of cases the master has made default in the performance of an existing duty which the servant had a right to expect would be fulfilled. The servant thus has an inchoate right of action, ripening when injury has resulted. The master can be relieved from liability only by some conduct on the plaintiff's part showing a waiver of the breach, and an assent to run the chance of injury without hope of compensation, or showing that the resulting injury was proximately caused by the plaintiff's, rather than the defendant's, negligence. In other words, the master, being in default, may defend either on the ground of *volenti non fit injuria*,¹³⁵ or on the ground of contributory negligence.¹³⁶ The distinction between these defenses has been pointed out.¹³⁷ A man may deliberately consent to run the risk of injury in the ex-

¹³⁵ Supra, § 85.

¹³⁶ Supra, § 84.

¹³⁷ Supra, § 86.

ercise of reasonable care and prudence, or he may bring injury upon himself by heedless, imprudent, or unreasonable conduct. The distinction between the two defenses has been recognized, and the rule under consideration has been based upon the principle, *Volenti non fit injuria*, in England, Massachusetts, and Indiana.¹³⁸ On the other hand, Alabama, Colorado, and the federal courts place the rule upon the plaintiff's contributory negligence.¹³⁹ All jurisdictions agree that if the danger was so great that the judgment of common men would condemn his conduct in continuing to work, and not throwing up his employment, as careless, he cannot recover.¹⁴⁰

Whatever theory is adopted, it is clear that something more than mere knowledge of the defect and appreciation of the danger on the part of the servant is required to relieve the master of liability. These are but some

¹³⁸ "The danger may be so great and so obvious that, in any possible view of the evidence, the general judgment of common men would at once condemn his conduct in continuing to work as careless. In such a case, it would be the duty of the court to order a verdict against him on the ground of a want of due care; but it would not necessarily follow that he voluntarily assumed the risk, so as to come within the doctrine, '*Volenti non fit injuria*.'" *Davis v. Forbes*, 171 Mass. 548, 557 (Knowlton, J., dissenting); *Mahoney v. Dore*, 155 Mass. 513; *Louisville & N. R. Co. v. Orr*, 84 Ind. 50; *Rogers v. Leyden*, 127 Ind. 50; *Woodley v. Metropolitan Ry. Co.*, 46 Law J. Exch. 521; *Thomas v. Quartermaine*, 18 Q. B. Div. 685. See *Miner v. Connecticut River R. Co.*, 153 Mass. 398.

¹³⁹ *Eureka Co. v. Bass*, 81 Ala. 201; *Wells v. Coe*, 9 Colo. 159; *Hough v. Railway Co.*, 100 U. S. 213, 224; *Kane v. Northern Cent. Ry. Co.*, 128 U. S. 91; *O'Rourke v. Union Pac. Ry. Co.*, 22 Fed. 189; *Louisville & N. R. Co. v. Kelly* (C. C. A.) 63 Fed. 407.

¹⁴⁰ *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441; *Davis v. Forbes*, 171 Mass. 548, 557. See *Southern Pac. Co. v. Seley*, 152 U. S. 145. And see cases cited in section 108, *supra*, and below.

of the elements necessary to the application of either the defense of voluntary assumption or of contributory negligence.¹⁴¹

Upon the issue of the plaintiff's knowledge and appreciation of the breach and danger caused by it, the court, it is believed, applies the same rules as when the risk is assumed upon first entering the employment; and the basis of this rule is negligence in failing to observe what a person of the plaintiff's experience and capacity should have noticed.¹⁴² But in determining what the plaintiff is bound to notice it is to be remembered that he has a right to rely upon the master's care in keeping the ways, works, machinery, etc., in substantially the same condition as to safety,¹⁴³ and is not bound to expect any default. He is not obliged to be on the lookout for danger, although he may have an equal opportunity with the master to discover it. The nature of his work may, however, bring the danger to his attention.¹⁴⁴ Again, he may not appreciate the risk because of assurances of safety given by his employer or some superior.¹⁴⁵

The Massachusetts cases chiefly discuss this aspect of the rule, and have, it is believed, carried the question of the plaintiff's knowledge and appreciation to an unrea-

¹⁴¹ *Wells v. Coe*, 9 Colo. 159; *Maydole v. Denver & R. G. R. Co.* (Colo. App.) 62 Pac. 964; *Eureka Co. v. Bass*, 81 Ala. 200; *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155; *Louisville, N. A. & C. Ry. Co. v. Sandford*, 117 Ind. 265; *Thomas v. Quartermaine*, 18 Q. B. Div. 685; *Dwyer v. St. Louis & S. F. R. Co.*, 52 Fed. 87; *Louisville & N. R. Co. v. Kelly* (C. C. A.) 63 Fed. 407; *Northern Pac. R. Co. v. Mares*, 123 U. S. 710.

¹⁴² Cases will accordingly be found in sections 95-97, *supra*.

¹⁴³ *Supra*, § 111.

¹⁴⁴ *Supra*, § 112; *Wells v. Coe*, 9 Colo. 159.

¹⁴⁵ *Supra*, § 113.

sonable extent. Thus, it was held in earlier cases that the degree of slipperiness of ice,¹⁴⁶ or the danger of stepping on soft earth thrown up from a trench,¹⁴⁷ was not appreciated, although the plaintiff knew the danger and was using especial care. The later cases tend to apply the ordinary rule as to obvious dangers, and this would seem to be the true inquiry. The plaintiff should be held to know and appreciate what the ordinary person, possessed of his knowledge, under the circumstances, would know in the exercise of care, and not what this particular person may have thought about the danger.¹⁴⁸

The nature of the default and the degree of the danger are also important elements to be considered. The servant "may think that the danger is not great enough reasonably to require him to refuse to work."¹⁴⁹ If the danger is momentary, it is not necessarily assumed. Thus, where the plaintiff was engaged in undermining a bank of earth, and the superintendent, who was to warn him, left for a few minutes, during which the accident happened, "it cannot be said, as a matter of law, that the plaintiff was bound to lay down his pick until his return. He had a right to rely upon the superintendent's returning in time, even if he knew there was danger of the bank falling."¹⁵⁰ So, the nature

¹⁴⁶ *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155; *Mahoney v. Dore*, 155 Mass. 513; *Osborne v. London & N. W. Ry. Co.*, 21 Q. B. Div. 221. See Massachusetts cases cited *infra*, § 114b.

¹⁴⁷ *Hickey v. City of Waltham*, 159 Mass. 460.

¹⁴⁸ Although the plaintiff did not regard the defect as dangerous, he assumed it. *Jenney Electric L. & P. Co. v. Murphy*, 115 Ind. 566.

¹⁴⁹ *Davis v. Forbes*, 171 Mass. 548 (Knowlton, J., dissenting).

¹⁵⁰ *Lynch v. Allyn*, 160 Mass. 248, 254; *Dwyer v. St. Louis & S. F. R. Co.*, 52 Fed. 87.

of the plaintiff's duty may be such that he cannot immediately quit work. Thus, where a brakeman fell from a car owing to the incompetence of the engineer, it was said: "The duty of the plaintiff under such circumstances is not to be determined by the single fact of his knowledge of the danger he incurred by continuing to serve with a co-employee known by him to be an unfit and incompetent person. It was enough for the court to say, as it did, that a failure on the part of the plaintiff to refuse to work, in view of that knowledge on his part, might be negligence on his part. * * * It was for the jury to say, from all the attending circumstances, whether his failure to do so was in fact contributory negligence. A suitable judgment on that question can only be reached by carefully weighing the probable consequences of both courses of conduct, and it might well happen that even at the risk of injury to himself, occasioned by the unskillfulness of his co-employee, the plaintiff might still reasonably be regarded as under a duty not suddenly and instantly to refuse to continue in the conduct of the business of the principal. Many cases might be conceived in which the latter course might even increase the danger to the plaintiff himself, and entail great injury and loss to others."¹⁵¹ There is a distinction, also, between dangers in the plaintiff's own control and those in another department. "The risk may arise from a defect in a machine which the servant has engaged to work, of such a nature that his personal danger and consequent injury must be produced by his own act. If he clearly foresaw the likelihood of such a result, and, notwithstanding, continued to work,

¹⁵¹ Northern Pac. R. Co. v. Mares, 123 U. S. 710, 720.

I think that, according to the authorities, he ought to be regarded as *volens*. The case may be very different when there is no inherent peril in the work performed by the servant, and the risk to which he is exposed arises from a defect in the machinery used in another department, over which he has no control."¹⁵²

When it is found that the plaintiff knew and appreciated the risk, the next issue of fact to be determined is the inference to be drawn from his conduct in continuing at work. Where no especial inducement appears in evidence, the question arises whether, under these circumstances, the mere fact of continuance at work shows conclusively contributory negligence or consent to waive the master's default, and run the chance of injury, thereby permitting the court to rule upon it as matter of law, or is only evidence of either of these defenses, from which different inferences are possible, and therefore should be submitted to a jury.

England, Massachusetts, and Indiana, as noted above, place the rule upon the principle of *volenti non fit injuria*, and consequently treat the continuance at work as affording an inference of consent to the defendant's default. While it is true that mere continuance at work affords an inference of consent, it may, and usually does, raise other inferences. The servant may by his neces-

¹⁵² Lord Watson, in *Smith v. Baker* [1891] App. Cas. 325, 355, 357. With reference to the last example above given: Where a defective derrick injured men engaged in cutting stone near it, the court said: "As neither of the men injured was concerned with the derrick, except that it was so near the place where they were at work that it might injure them if it should fall, we think it could not be said, as a matter of law, that they were negligent in working there, or that they had accepted the risk of injury." *McMahon v. McHale*, 174 Mass. 320.

sities be compelled to stay; the nature of his work may require his continuance; he may, without intending to give up any rights against his master, hope with care to protect himself from injury and retain his employment. He is not free to go or stay, as is the case when he originally accepts employment. In England the court has found itself unable to weigh these different inferences, and, since consent is a fact to be affirmatively established in order to complete the defense, the issue is submitted to the jury.¹⁵³ Massachusetts and Indiana,¹⁵⁴ on the other hand, recognize only the inference of consent, and unless it appears that the plaintiff was induced to stay through fear of discharge,¹⁵⁵ or by a promise of repair,¹⁵⁶ it is held, as a matter of law, that he has consented to the risk. The result of this ruling is that the master's default has cast on the plaintiff the burden, not only of using due care, which in any event he is required to use, but the necessity of taking some active steps to protect himself, under the penalty, otherwise, of consenting to the breach, and losing his remedy for a resulting injury.

The theory stated in the other jurisdictions is that continuance at work under circumstances where injury

¹⁵³ *Smith v. Baker* [1891] App. Cas. 325; English cases cited *infra*, § 114a.

¹⁵⁴ Massachusetts and Indiana cases cited *infra*, §§ 114b, 114c.

¹⁵⁵ *Supra*, § 107.

¹⁵⁶ *Infra*, § 115. Certain expressions in the cases would show that complaining of danger would be enough to rebut the inference. *Hatt v. Nay*, 144 Mass. 186; *Watts v. Boston Tow-Boat Co.*, 161 Mass. 378; *Louisville & N. R. Co. v. Kelly* (C. C. A.) 63 Fed. 407. But this would seem not to be the rule. See *infra*, § 115. There is no need to complain of a danger the master knows. *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378.

is "reasonably to be apprehended" is negligence contributing to the injury;¹⁵⁷ and it is not necessary that the injury should appear unavoidable.¹⁵⁸ If negligence is the theory, then fear of discharge, promise of remedy, or unwillingness to incur the risk is immaterial, and neither affords an index as to the plaintiff's due care nor shows that his failure to quit work was the proximate cause of his injury. They can be important only as negating consent to waive a right. Whatever may have been his motives, the fact remains that he did continue in service, and that is said to be the negligence. But inasmuch as these exceptions are established in Alabama and the other courts, it would seem that the distinction between the defenses of *volenti non fit injuria* and contributory negligence was recognized, and that the conflict in the decisions is more in the form of statement than in substance.

Whatever theory may be adopted, negligence and consent are both affirmative facts depending upon inferences to be drawn from the conduct of a party, and therefore are ordinarily to be determined by a jury. Like any other facts in issue, a court may decide them only when the inference to be drawn is conclusive, and reasonable men cannot come to different conclusions concerning it. In this class of cases, however, the court, when it finds that a plaintiff knew and appreciated the risk, affixes but one inference to his conduct in remaining at work, and, when it appears that he did continue working, says, as a matter of law, that this conduct conclusively shows

¹⁵⁷ Eureka Co. v. Bass, 81 Ala. 201. See Alabama, Colorado, and federal cases cited *infra*, §§ 114d, 114e, 114f.

¹⁵⁸ Highland Ave. & B. R. Co. v. Walters, 91 Ala. 435, 442.

negligence or consent. But his conduct is the same under all conditions, and may be induced by different motives. Standing by itself, it shows nothing. The rule of law is that he shall lose his remedy only through negligence or consent, and such negligence or consent can only be drawn from the fact of his continuance, which may or may not be evidence, or sufficient evidence, of it. Since the mere fact of continuance at work is capable of different constructions under different circumstances, the court cannot say that in any event only one inference shall be drawn from it, and the plaintiff's negligence or consent determined by the other factors in the case. Such a ruling usurps the province of the jury in every case where it is not clear that, viewed as a fact, reasonable men would agree in condemning his conduct as careless, or in finding from it actual consent to undertake the risk, and absolve his master from liability.¹⁵⁹ But apparently, outside of England, this is

¹⁵⁹ It was suggested in sections 82 and 107 that the disabilities imposed on the servant and the duties imposed on the master arose from the relationship, and not from the agreement of the parties, although they attended a contract of hiring. The contract of hiring may be express, or implied from the understanding of the parties. In England there is a presumption that a general hiring is a hiring for a year; but in the United States it is generally held that such a hiring is determinable at any time at the will of either party, although in some cases the period of payment is considered to measure its duration. If there is an executory contract of hiring, or circumstances defining its duration, the master is bound to give employment, and the plaintiff is bound to serve for the period in accordance with its terms. Continuance in the employment after the period has ended is a renewal of the hiring upon the same terms.

The duties and disabilities which the law imposes on persons standing in this relation are fixed by the condition of affairs when the relation is established, and end when the relationship terminates. When the contract of hiring ends, the relationship ends,
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not the law as declared in the recent decisions, and the courts have enacted the rule that, when a servant

and the plaintiff is as free to renew it or not as when he first became a servant. But his disabilities, although occasioned by the relation and attending it, are fixed by the condition of affairs at the time, and not by agreement, and therefore have nothing to do with his contract. Thus, when the hiring is renewed, new disabilities or new duties may be imposed as if for the first time employment had been accepted.

The result of this theory would be that, if a plaintiff were hired for a week, he and his master would each be bound, by contract, to continue the employment for a week. Thus, if, on the second day of employment, the machine on which he worked became defective through the master's negligence, and the plaintiff appreciated the danger, the question whether his continuance at work barred his recovery for an injury, happening within the period, might depend on several inferences,—the danger might be so great that he was guilty of negligence in encountering it, or so slight that he preferred to worry along with it, rather than lose his chance of employment for the remainder of the term; his necessities may force him to remain, unwillingly, or the character of the work may prevent his immediately dropping it; or he may have had a promise of repair. These and other reasons may show that he did not consent to the master's default, and unless it is conclusive that he was negligent, or that he did in fact consent, the jury should find the meaning of his conduct. When, however, his week is up, all these reasons, duties, and disabilities fall, and the plaintiff may make a new contract or not, as he chooses. If he makes a new contract, he knows the risks, his act is voluntary, and he waives no rights. The duties and disabilities which the court must determine are fixed by the conditions existing at that time, without regard to the fact or the history of his previous hiring, and, under the established rule, are to be passed upon by the court. For the same reason, if there were no executory contract, his coming to work on the following morning, when he might have stayed away, and when the employer might properly have forbidden him to come, would, as a matter of law, be an acceptance of the existing conditions and risks.

The point is merely whether the court or the jury is the proper tribunal to decide what inference is to be drawn from the plaintiff's conduct. It may be objected that, where the plaintiff's conduct re-

knows of a defect arising through his master's negligence, and appreciates the danger to himself from it, his conduct in continuing at work, if nothing more ap-

mains the same, and is merely that of working in the face of a known danger, the court should in all cases, whether he begins or continues the employment, draw the same inference from his act, and that the interposition of a new contract of hiring should not change this rule. On the other hand, if the motives which influence the plaintiff's conduct are, in any event, to be considered, he may as well be induced by fear of idleness to enter a dangerous service, as be induced by fear of losing his legal right to continue at work, to undertake an unforeseen risk, and in each case, therefore, the jury should pass upon his consent. But this raises a social and not a legal question, which the legislature and not the court must solve.

The law must be taken as it stands, and, whatever the wisdom of the rule, it is unquestioned that, having no right to be employed, the plaintiff must be considered absolutely free to take or reject service, and his act of entering the employment, whatever motives may have induced it, shows a willingness to enter the relation, and accept the disabilities which the policy of the law, and not his contract, has annexed to it. Having established this legal fiction, the court itself properly construes it, and may properly construe it whenever the rights and facts upon which it is based appear.

But the law is not unquestioned as to the rule to be adopted where the fact is not of entering an employment, but of remaining in it. Where the plaintiff has a right to continue in an employment, secured to him by his executory contract, different considerations arise, and a legal fiction will not be invoked to take away a right which the law can, as in this case, recognize. The inquiry does not concern the plaintiff's negligence, but his consent to give up this right. Consent depends upon motives and inferences from conduct which a jury is the proper tribunal to weigh. The law may place what construction it pleases upon the plaintiff's act in the one case, because his rights are in its own control, but in this latter case it must also give effect to the rights which the plaintiff has obtained by his contract, and a legal fiction should not be invoked to destroy them. If the question in this latter case is, as it seems, one of fact, the court has no power to trench upon the province of the jury in determining it merely because the plaintiff happens to be a servant.

This view has several times been suggested in the cases. Thus (552)

pears, is conclusively presumed to show either his contributory negligence or his voluntary consent to the breach, and thus bars his recovery.¹⁶⁰

Lord Bramwell said in *Smith v. Baker* [1891] App. Cas. 325: "In these services, every week there is a new engagement, and therefore his last week's work was under a contract made by the plaintiff with full knowledge of the risk. If we suppose the contract was from week to week, till determined by notice, surely he is volens if he does not give the notice."

So in *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill. 365, 370. "Plaintiff's engagement with defendant was for no definite period. If he discovered the service was rendered more dangerous than he anticipated, by the use of these foreign cars, he was under no obligation to continue in it. He had been employed by the trip, and was at liberty to quit at any time."

In *Poirier v. Carroll*, 35 La. Ann. 699, the plaintiff was employed to take off a cotton crop at a monthly salary, and the Code provides in such cases that the employment shall last during the season. The plaintiff, finding his assistant incompetent, complained, and was told that when the master could obtain another man he would do so. "Had Poirier thrown up his engagement and left his employment owing to his fears and apprehensions of danger and injury which might have resulted from his conception of Rolf's incompetence, and had he afterwards brought an action for payment, and been unable to establish with legal certainty the existence of a just and good cause, to the satisfaction of a court, with a burden of proof upon him, the consequence would have been to him the loss of not only his pay for time to come, but also [under the Code] the return to his employer of that already received. * * * Poirier was not bound to undertake that risk. He had a right to remain, notwithstanding his fears of danger. By remaining and doing his duty, he would be entitled to pay, and thus meet his responsibilities. From the fact of his thus continuing, we are averse to infer that he waived his right to a fitness of his fellow servants." See, also, *Leary v. Boston & A. R. Co.*, 139 Mass. 580; *Davis v. Forbes*, 171 Mass. 548, 556; *Reed v. Stockmeyer* (C. C. A.) 74 Fed. 186.

¹⁶⁰ The rule is not yet established. Thus in a dissenting opinion in *Massachusetts* it is said: "I think it can seldom be said, as matter of law, that the employe has lost his legal right to hold his employer for the consequences of his negligence on the ground of

§ 114a. England.

The distinction between a risk which existed at the time of accepting the employment and one which arose afterwards was noted in the earlier cases. "There is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied."¹⁶¹ This distinction was further developed by the same judge: "A man who enters on a necessarily dangerous employment with his eyes open takes it with its accompanying risks. On the other hand, if the danger is concealed from him, and an accident happens before he becomes aware of it, or if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, and from the want of such precautions an accident happens to him before he has become aware of their absence, he may hold the employer liable. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit

voluntary assumption of the risk by continuing to work, unless his own conduct is such that, viewed independently, it furnishes no evidence of his due care." *Davis v. Forbes*, 171 Mass. 548 (Knowlton, J.).

¹⁶¹ *Clarke v. Holmes*, 7 Hurl. & N. 937 (Cockburn, C. J.). See, also, cases cited *supra*, §§ 88, 90, 92; *Griffiths v. London & St. Katharine Docks Co.*, 12 Q. B. Div. 493, 13 Q. B. Div. 259.

the employment. If he continues in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance, and must be taken to waive his right to call upon the employer to do what is necessary for his protection, or, in the alternative, to quit the service. If he continues to take the benefit of the employment, he must take it subject to its disadvantages. * * * If a man, for the sake of the employment, takes it, or continues in it, with a knowledge of its risks, he must trust to himself to keep clear of injury."¹⁶² The other judges did not consider, in this case, that continuance in the service, as a matter of law, was an acceptance of the risks, and thus is raised the much debated question how far, as a matter of law, the servant's knowledge and appreciation of the danger can be said to be an acceptance of it.

In the case of *Thomas v. Quartermaine*,¹⁶³ which arose under the act, the facts were that the plaintiff worked in a room where there were two open and unprotected vats, between which was a narrow passageway. The plaintiff, attempting to pull a board from under one of them, fell backwards into the other by reason of the board suddenly giving way. The county court gave judgment for the plaintiff, finding that there was a defect in the condition of the ways, and that the plaintiff was not guilty of contributory negligence. The divisional court gave judgment for the defendants, which the court of appeal affirmed.

Lord Esher, M. R., dissenting, considered that the ef-

¹⁶² *Woodley v. Metropolitan Ry. Co.*, 46 Law J. Exch. (N. S.) 521, 2 Exch. Div. 384 (Cockburn, C. J.).

¹⁶³ 18 Q. B. Div. 685.

fect of the act had been to take from the master the defense that the servant had assumed the risks incident to the business, and leave open only the defense of contributory negligence; and that the question was properly submitted to the jury. Bowen, L. J., with whom Fry, L. J., concurred, held that the act had placed the servant, in regard to the cases specified in it, in the position of one invited to the master's premises, and that "the duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognizant of the full extent of the danger, and voluntarily run the risk;" that the defense of *volenti non fit injuria* was left untouched by the act; and, after stating that this defense lay entirely outside the defense of contributory negligence, described it as follows: "Where the danger is one incidental to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all. Knowledge is not a conclusive defense in itself. But where it is a knowledge under circumstances that leave no inference open but one, viz., that the risk has been voluntarily encountered, the defense seems to me complete."

The facts do not show that the danger was existing and known at the time of the plaintiff's entrance into the employment, but the inference is that the danger did exist at that time, and the case is so considered. What (556)

the case holds, therefore, is that, where a person accepts employment subjecting him to dangers which he knows, the master owes him no duty in regard to them; and the fact of doing such an unequivocal act as accepting an employment which he is free to take or leave, coupled with his knowledge, permits the court to hold, as a matter of law, that the employer owed him no duty and was not negligent. No inference is open but that one. This is in accord with the earlier decisions, and with the rule of contractual assumption of risks considered in the preceding chapter.

In the succeeding case of *Yarmouth v. France*,¹⁶⁴ where the plaintiff, a teamster, was injured by a vicious horse purchased after his entry into the employment, and concerning which he had complained, the county court held, upon the authority of *Thomas v. Quarter-*

¹⁶⁴ 19 Q. B. Div. 647.

"He must not only be a volunteer in the sense that he went there when he might have stopped away, but it must clearly appear that he went there voluntarily with a full knowledge and understanding of the risk." *Britton v. Great Western Cotton Co.*, L. R. 7 Exch. 130, 137.

"If the evidence was all one way, it was for the judge to withdraw the case from them. If there was conflicting evidence, as if, for instance, there was evidence of compulsion, as in *Yarmouth v. France*, the question must be left to the jury." *Bowen*, L. J., in *Members v. Great Western Ry. Co.*, 4 Times Law R. 504.

"It is difficult to say where a man is lawfully working, subject to the orders of his employers, and to the risk of dismissal if he disobeys, that if, after asking for and failing to obtain protection from the danger caused by other people's work, he suffers injury, the maxim, '*Volenti non fit injuria*,' applies. It is true he knows the danger, but he does not willfully incur it." *Thrussell v. Handyside*, 20 Q. B. Div. 359, 364. See, also, *Members v. Great Western Ry. Co.*, 14 App. Cas. 179; *Osborne v. London & N. W. Ry. Co.*, 21 Q. B. Div. 221; *supra*, §§ 100, 101.

maine, that the plaintiff could not recover. The divisional court held that the case should have been submitted to the jury. Lord Esher, M. R., changing the opinion expressed in the former case, considered that the defense of *volenti non fit injuria* was not taken away by the act, and said that *Thomas v. Quartermaine* held that "mere knowledge of the danger will not do. There must be assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim, *Volenti non fit injuria*. If so, that is a question of fact." The judge below "did not bring his mind to bear upon the motives which induced the plaintiff to act as he did,—whether he relied upon the foreman's statement that the employer would be responsible in case of an accident, or whether he was influenced by the fear of being thrown out of employ if he disobeyed the foreman's orders. * * * I see nothing in the decision in *Thomas v. Quartermaine* to prevent the plaintiff from recovering in this case, unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."

Lindley, L. J., held: "If in any case it can be shown as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But in the cases mentioned in the act a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot, in my opinion, be held, as a matter of law, to have impliedly agreed to incur that danger, or to have volun-

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tarily incurred it, because he does not refuse to face it. Nor can it, in my opinion, be held that there is no case to submit to a jury on the question whether he has agreed to incur it or has voluntarily incurred it or not, simply because, though he protested, he went on as before. * * * If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in taking the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred. *A fortiori* might the jury properly come to such a conclusion if it was proved that the workman was told by his superintendent not to mind, and that, if any accident happened, the employer must make it good. Such an additional circumstance would go far to mitigate the inference that the complaining workman took the risk upon himself."

Lopes, L. J., dissenting, said: "After complaining, he remains in the service for a long time, knowing the risk, and knowing that no steps had been taken to prevent its continuance. This is more consistent with his acquiescence in a disregard of his complaints, and with a willingness to incur the risk, than with the contrary view."

In this case the danger was subsequent to the employing, and was caused by a breach of the defendant's obligation to furnish reasonably safe horses for his servants to use. Although the preceding case of *Thomas v. Quartermaine* was much discussed, it was not overruled, and that was unnecessary. There appeared here several

facts material upon the question of the plaintiff's acceptance of the danger. He had complained, and was told by his foreman not to mind. It is true that with knowledge he continued at work, but that was not such an unequivocal act as to leave "no inference open but one." Here was a conflict of inferences to be drawn from the facts, and the question was properly left to the jury to decide which was the right inference. That is the ground upon which Lindley, L. J., distinguishes *Thomas v. Quartermaine*, where the facts were "all one way in showing *volens*," and upon that ground the dissenting opinion of Lopes, L. J., is erroneous because he is weighing the conflicting inferences instead of submitting them to the jury.

Although the cases may be thus distinguished, yet the effect of the later decision has been to weaken *Thomas v. Quartermaine*, since it seems to permit an inquiry into the motives which induce a man to accept employment in the first instance, and does not confine this inquiry to his continuance in service after the knowledge of a subsequent danger arising from his master's fault. In other words, the distinction between accepting a dangerous employment which he may take or not, and thereby fixing the master's duty towards him, and continuing in an employment which he is not in the same sense free to leave, and thereby condoning the master's breach of duty, is not distinctly taken, although Lindley, L. J., said: "The plaintiff was not engaged to drive a vicious horse."

The case holds that, when a new danger arises after the employment, mere continuance with knowledge of it will not of itself be an assent to the risk, but it is a
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question for the jury what inference, as to the plaintiff's assent, they will draw from that fact and the other circumstances of the case.

The next important case upon the subject was *Smith v. Baker*,¹⁶⁵ where the plaintiff, employed to drill holes,

¹⁶⁵ [1891] App. Cas. 325. See 8 Law Quart. Rev. 202.

Of the opinions expressed in the house of lords:

Lord Halsbury, L. C., held: "A person who relies on the maxim must show a consent to the particular thing done. Of course, I do not mean to deny that a consent to the particular thing may be inferred from the course of conduct, as well as proven by express consent; but if I were to apply my proposition to the particular facts of this case, I do not believe that the plaintiff ever did or ever would have consented to the particular act done under the particular circumstances. * * * I am of opinion, myself, that, in order to defeat a plaintiff's right by the application of the maxim relied on who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself."

Lord Watson said that "the question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to the injury, but whether he agreed that, if injury should befall him, the risk was to be his, and not his master's. Where, as is commonly the case, his acceptance or nonacceptance of the risk is left to implications, the workman cannot reasonably be held to have undertaken it unless he knew of its existence, and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent, upon the nature of the risk, and the workman's connection with it, as well as upon other considerations, which must vary according to the circumstances of each case."

"The risk may arise from a defect in a machine which the servant has engaged to work of such a nature that his personal danger and consequent injury must be produced by his own act. If he clearly foresaw the likelihood of such a result, and, notwithstanding, continued to work, I think that, according to the authorities, he ought

was set to work near a crane which swung stones over his head. No warning was given him when a stone was to be moved, and he had to look out for himself. A stone split while being raised, and fell on him. He knew the danger and continued at work. The case is filled with different expressions of opinion. The county court gave judgment for the plaintiff on the ground that the defendant was negligent, and the plaintiff was not negligent, and did not voluntarily assume the risk, in accordance with the findings of the jury on these issues. The divisional court allowed the defendant's appeal. The court of appeal gave judgment for the defendant,

to be regarded as *volens*. The case may be very different when there is no inherent peril in the work performed by the servant, and the risk to which he is exposed arises from a defect in the machinery used in another department over which he has no control."

Lord Herschell held that "there may be cases in which a workman would be precluded from recovering, even though the risk which led to the disaster resulted from the employer's negligence. If, for example, the inevitable consequence of the employed discharging his duty would obviously be to occasion him personal injury, it may be that, if with this knowledge he continued to perform his work, and thus sustained the foreseen injury, he could not maintain an action to recover damages in respect to it." But holding that such is not this case, his opinion proceeds: "Where, then, a risk to the employed, which may or may not result in injury, has been created or enhanced, by the negligence of the employer, does the mere continuance in service, with knowledge of the risk, preclude the employed, if he suffer from such negligence, from recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim '*Volenti non fit injuria*' applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong. * * * Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of the danger thereby engendered. If, then, the employer thus fails in his duty towards the employed, I do not think that, because he does not straightway refuse to continue (562)

and the house of lords, reversing it, held, by a divided court, that the question was properly submitted to the jury, and there was evidence to support the verdict.

In this case there was no doubt but what the plaintiff both knew and appreciated the risk, and the facts are stronger in showing an acceptance of it by mere continuance at work than in the earlier case of *Yarmouth v. France*. The decision does not adopt any theory or settle any principle of law; but the holding of the court must be, as it has been treated in later cases, that continuance at work with knowledge of a danger created by the employer's fault does not, without more, permit a court to find a voluntary consent to incur the risk, and the question of the plaintiff's consent must be submitted to the jury.¹⁶⁶ *Thomas v. Quartermaine* was

his service, it is true to say that he is willing that his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim '*Volenti non fit injuria*' becomes applicable."

Lord Morris said that the plaintiff "may have voluntarily entered on a risky business; but he did not voluntarily undertake it plus the risk from defective machinery. There must be an assent to undertake the risk with the full appreciation of its extent." Lord Bramwell, dissenting, expressed his disagreement with the case of *Yarmouth v. France*, above cited, and said that "the maxim applies where, knowing the danger or risk, the man is volens to undertake the work."

¹⁶⁶ *Williams v. Birmingham B. & M. Co.* [1899] 2 Q. B. 338: No ladder or other means was provided for ascending an elevated tramway along which ore was drawn and dumped in pockets at either side. The plaintiff attempted to descend by stepping on ore in bins, and fell. He had been long employed, and the other way of descending was equally dangerous. The jury found that the defendants were negligent, that the plaintiff was not negligent, and that he knew the danger. The divisional court sustained the plaintiff's ver-

not overruled, but criticised, and the distinction between risks existing at the time of the employment and those later arising was not clearly taken upon the question of the plaintiff's voluntary consent. Indeed, when the case was in the divisional court, Wills, J., said: "I can-

dict, considering that his knowledge was not conclusive, and that there was no evidence of his consent to the risk. It is to be noted that the facts do not disclose whether this was a danger which existed upon his entrance into the employment or not. The correctness of the decision would seem to hang upon this point.

Wallace v. Culter Paper Mills Co., 19 Rettie, Ct. Sess. Cas. (4th Ser.) 915: Machine became unfenced after plaintiff entered the employment. He complained, and was injured while pointing out the defect to defendant's engineer. Held, the question of his consent was for the jury. The absence of fencing was obvious, and plaintiff knew it, but it cannot be presumed that he agreed to his master's negligence; and continuance at work does not show a willingness to take the risk or agreement "to relieve his master of the consequences of any injury caused by what, ex hypothesi, is the master's fault." The proper inference from his complaining and not getting the defect removed is that he let the master take the risk.

In addition to cases cited above, see the following: *Hoey v. Dublin & B. J. Ry. Co.*, 5 Ir. R. C. L. 306: On demurrer it appeared that for a reasonable time plaintiff had knowledge of the incompetence of the servant of whose negligence he complained. Held for plaintiff, that knowledge is only evidence of negligence, and not negligence per se, and that, although it may be conclusive upon entrance into the service, it is not when the cause arises afterwards. *Langham v. Young* (July 30, 1881) 71 Law T. 232: Using spliced rope after knowledge and warning, no recovery. *Bacon v. Dawes*, 3 Times Law R. 557: Defective hydraulic crane, of which plaintiff had complained, but was told to go on and make the best of it, which he did. Held going on with work not enough; it must appear that he was contented to go on, knowing the danger. *Baxter v. Wyman*, 4 Times Law R. 255: Plaintiff told to fix belt, which was out of his employment, and dangerous. Question of his willingness to encounter it is for jury. *Church v. Appleby*, 5 Times Law R. 88: Plaintiff's intestate fell from unrailed platform, and jury found that he knew and was willing to encounter the danger, and the court held that they might properly so find from his continuance in service (564)

not draw the distinction between the man accepting the risk in the first instance, and his continuing in the employment under circumstances which brought the risk to his mind."

As a result, the later cases do not follow *Thomas v. Quartermaine*,¹⁶⁷ even when the risk exists at the entrance into the employment, but hold that the question of voluntary consent is in issue, and the presumption arising from the plaintiff's act, either in accepting or continuing in a dangerous employment, may be rebutted, and the issue submitted to the jury, unless the evidence is all one way. The question of the plaintiff's knowledge has not been discussed, since, in general, the facts show that he knew and appreciated the danger. Where this does not appear, it would seem that the existence and extent of his knowledge are also for the jury.

§ 114b. Massachusetts.

Assuming that the plaintiff knew and fully appreciated the risk, the question what inference is to be drawn from the mere fact of his continuance in service under such circumstances has not been much discussed in Massachusetts. In *Snow v. Housatonic R. Co.*¹⁶⁸ it was "suggested that the plaintiff ought not to

with knowledge. *Medway v. Greenwich Inlaid Linoleum Co.*, 14 Times Law R. 291 (boy used his hands to take linoleum out of box where there were revolving blades. "As regards the maxim, '*Volenti non fit injuria*,' if it could be made out that the injured person had agreed to undertake the risk, the maxim would apply. That was for the jury, and they found that the plaintiff did not appreciate the risk"). See, also, *Sanders v. Barker*, 6 Times Law R. 324; *Amos v. Duffy*, 6 Times Law R. 339.

¹⁶⁷ 18 Q. B. Div. 685.

¹⁶⁸ 8 Allen (Mass.) 441, 450. See, also, *supra*, §§ 85, 100, 101.

recover because he continued in the performance of his duties after he was aware of the existence of the defect in the road. There may be cases where a servant would be wanting in due care by incurring the risk of injury in the use of defective or imperfect machinery or apparatus, after he knew it might cause him bodily harm. But we do not think this case is one of that class. His continuance in the employment did not necessarily and inevitably expose him to danger." Here, as in several of the earlier cases, the defense is treated as that of contributory negligence rather than *volenti non fit injuria*. In *Mellor v. Merchants' Mfg. Co.*¹⁶⁹ it was said: "There might be cases where the plaintiff would be held to have taken the risk, irrespective of any implied term in his contract of service, even if he could not properly be said to have been negligent. * * * If the servant is acting within the scope of his regular employment, or in obedience to special orders, the fear of losing his place may take away his choice so far that he cannot be said freely to take the risk upon himself. Again, he may not appreciate the danger. So, the mere knowledge of the employe and his continuing in the employ may not be necessarily fatal to him. It is observed by Bowen, L. J., that the maxim is not *Scienti non fit injuria*, but *Volenti non fit injuria*."

The question was first distinctly presented in *Fitzgerald v. Connecticut River Paper Co.*,¹⁷⁰ where it is said: "The chief practical difficulty in applying [the

¹⁶⁹ 150 Mass. 362. See *Hatt v. Nay*, 144 Mass. 186; *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 138.

¹⁷⁰ 155 Mass. 155.

maxim] is in determining when the risk is assumed voluntarily. In the first place, one does not voluntarily assume a risk who merely knows that there is some danger, without appreciating the danger. On the other hand, he does not necessarily fail to appreciate the risk because he hopes and expects to encounter it without injury. If he comprehends the nature and the degree of the danger, and voluntarily takes his chance, he must abide the consequences, whether he is fortunate or unfortunate in the result of his venture. * * * What constraint, exigency, or excuse will deprive an act of its voluntary character when one intentionally exposes himself to a known risk is a question about which learned judges differ in opinion. It has been held by some that where a man is not physically constrained, where he can take his option to do a thing or not to do it, and does it, he must be held to do it voluntarily. But by the authorities generally one who, in an exigency, reluctantly determines to take a risk is not held so strictly. There has been much difference among the English judges in regard to the question whether a servant who discovers a defect in machinery, not existing when he entered the service, which the master is bound to repair, and who works on, understanding the danger, rather than to lose his place by complaining of it or refusing to work until it is repaired, shall be held to have voluntarily assumed the risk." The opinion then states: "In this commonwealth, as well as elsewhere, plaintiffs have been precluded from recovering, alike where their assumption of the risk grew out of an implied contract in reference to the condition of things at the time of entering the defendant's (567)

service, and where they voluntarily assumed a risk which came into existence afterwards.¹⁷¹ This court has recognized the doctrine that mere knowledge of a danger will not preclude a plaintiff from recovering unless he appreciates the risk. Many other cases in which the plaintiff has not been precluded from recovering may be referred to this principle, and some of them more properly rest on the ground that there were such considerations of duty or exigency affecting him as to present a question whether the assumption of the risk was voluntary, or under an exigency which justified his action, and induced him unwillingly to encounter a danger to which he was wrongfully exposed."

In *Mahoney v. Dore*¹⁷² it is said: "In a very recent case in England (*Smith v. Baker* [1891] App. Cas. 325) it has been decided by the house of lords that a servant who continues to work where he is exposed to a danger which he understands and appreciates, and which results from his employer's negligence, and which he did not assume by his implied contract when he entered the service, does not, as a matter of law, voluntarily assume it by merely remaining in a place which is rendered unsafe by his master's fault. We are not

¹⁷¹ This statement does not mean that mere continuance in the service is, as a matter of law, a voluntary assumption of the risk, and none of the cases cited sustain such a proposition. In *Huddleston v. Lowell Mach. Shop*, 106 Mass. 282, the plaintiff did not know the danger. The decision in *Taylor v. Carew Mfg. Co.*, 140 Mass. 150, stands equally well on the fact that the plaintiff was negligent, and in *Lewis v. New York & N. E. R. Co.*, 153 Mass. 73, there was evidence on the question of voluntary assumption, from which it might reasonably be inferred that the plaintiff was willing to take the risk.

¹⁷² 155 Mass. 513, 519; *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, 73.

aware of any adjudications in this commonwealth which are necessarily inconsistent with this just and reasonable doctrine, although different opinions have been expressed on this point by eminent judges, both here and in England. * * * The tendency of recent decisions is to hold that, in regard to dangers growing out of the master's negligence, which are not covered by the implied contract between the master and servant when the service was undertaken, it is a question of fact whether a servant who works on, appreciating the risk, assumes it voluntarily, or endures it because he feels constrained to."

Although these cases did not decide the proposition, yet the later decisions hold that if a servant, knowing and appreciating the risk, continues in the service, the only inference which can be drawn from the fact of his continuance under such circumstances is that he assented to and voluntarily incurred the danger, and, as a matter of law, he cannot recover. "Under the decisions in this commonwealth, if he knew and appreciated the risk, and continued to work for the length of time and under the circumstances that appear in this case, he must be held voluntarily to have assumed it, so that his share in the responsibility for the accident charges him with negligence and precludes him from recovery, if the use of the saw by the defendant constituted negligence. If this appears, it is unnecessary to determine separately the question whether the defendant was negligent, and whether the plaintiff was in the exercise of due care."¹⁷³

The question that has raised the greater difference

¹⁷³ *Tenanty v. Boston Mfg. Co.*, 170 Mass. 323, 324; *Davis v. Forbes*, 171 Mass. 548, 556. See cases cited in this section.

of opinion, however, is not whether mere continuance in the service, with knowledge and appreciation of the risk, is, as a matter of law, a voluntary assumption of it, but rather what circumstances will justify a court in holding, as matter of law, that the plaintiff has sufficient knowledge and appreciation. When an employment is entered into, the rule is that the plaintiff is presumed to know and appreciate whatever a person of his intelligence would know if he exercised reasonable care to inform himself; and he is charged with a knowledge and appreciation of these obvious dangers, though he may not in fact have known them. The doubt has been whether the same rule is to be applied in cases of danger caused by the master's negligence and arising subsequently, or whether the plaintiff must in fact have known and appreciated the danger.

The earlier cases required evidence of the plaintiff's actual knowledge, or facts so conclusive that the only inference was that the plaintiff knew and appreciated the risk. Thus, where a plaintiff fell on icy steps, it was said: "She knew that the steps were icy, and that there was some danger in passing over them. But the evidence tended to show that their condition in regard to slipperiness was constantly changing in different states of the weather, with the spray falling daily from the steampipe and freezing upon them. Common experience tells us that the degree of slipperiness of ice is not always determinable from an ocular inspection of it. If it were certain that the extent of the danger was obvious to one who saw the surface of the steps, the case would be different."¹⁷⁴ The later cases have

¹⁷⁴ *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155 (570)

not gone to this extreme. Thus, a man experienced in the use of circular saws must, as a matter of law, know and appreciate the risk that, if a strip of hard board falls on the teeth of a rapidly revolving saw, it will be thrown violently forward;¹⁷⁵ and the danger of un-railed vats is known and appreciated, although the plaintiff had never seen them uncovered but twice, and then in the daytime, and he was injured at night, when the light was dim.¹⁷⁶ The tendency seems to be to ap-

(Jury); *Mahoney v. Dore*, 155 Mass. 513 (Jury); *Hickey v. City of Waltham*, 159 Mass. 460 (appreciation of risk of stepping on soft earth thrown up from trench is for jury).

¹⁷⁵ *Tenanty v. Boston Mfg. Co.*, 170 Mass. 323 (Court).

¹⁷⁶ *Carrigan v. Washburn & Moen Mfg. Co.*, 170 Mass. 79 (Court); *Goldthwait v. Haverhill & G. St. Ry. Co.*, 160 Mass. 544 (Court: Use of longer and wider open cars); *Scanlon v. Wedger*, 156 Mass. 462: A voluntary spectator of a display of fire works takes the risk. *Morton, J.*, dissenting: "There is no evidence that (the plaintiffs) knew or had any reason to suppose that such mortars were liable to explode and injure bystanders, or that they were familiar with their construction, or the manner in which they were fired, or were aware that the bombs were charged with an explosive more powerful than ordⁿ gunpowder. There is nothing to show that they had any knowledge or suspicion that they were incurring any risk by being where they were. An inference or a conclusion that they were not unaware of the risk rests, it seems to me, entirely on assumption." *Goddard v. McIntosh*, 161 Mass. 253: Plaintiff standing on plank resting on tail end of wagon fell because the horses started. Held: "It is plain that the risk of such an accident was obvious, and that it must have been understood and appreciated by the plaintiff. * * * It was apparent that, if the horses should start, the planks on which the plaintiff stood would be displaced, and the plaintiff exposed to a fall. So far as the danger upon that particular occasion was enhanced by the facts that the horses then attached to the wagon were restless and that they were not hitched or fastened to a weight, but left with the reins thrown loosely over the seat, and that the wheels were not blocked, the plaintiff saw and knew all these things before he and the teamster put on the planks, and he went upon them to work." *Knowlton, J.*, dissenting, said: (571)

ply the same considerations to the facts from which a plaintiff's knowledge and appreciation may be inferred as are employed when the plaintiff first accepts the service, but that cannot yet be said to be the rule.

The doubt is not what instructions should be given to a jury, but under what circumstances the court may itself decide the matters of fact necessary to support this defense. It would seem that the court will, as a matter of law, find that the plaintiff knew and appreciated the risk whenever the danger is such that one of his experience must, if he had thought or used his senses, have recognized it, and that, when this has been determined, the only inference possible from continuance in the service is that the risk has been voluntarily assumed.¹⁷⁷ The risk may be, of course, so great that

"From the evidence reported in this case, a jury might have found, on their common knowledge, that the horses ordinarily used in drawing bricks and other heavy loads in Boston are so trained and accustomed to their work that nobody deems it necessary to hitch them while occupied on or about the wagon in loading or unloading. The plaintiff was engaged in his usual way in the business in which he had daily worked in safety for about two months. * * * The jury properly might have found that, if the horses had been such as are commonly used in this kind of business, and such as the plaintiff supposed them to be, he would not have been hurt. * * * As I understand the decisions, before he can be so precluded, it must appear beyond the possibility of a finding to the contrary that he understood and appreciated the danger." See cases cited *supra*, §§ 90-100; § 111 (reliance on care of master); § 112 (opportunity to observe); § 113 (assurance of safety).

¹⁷⁷ The cases arising under this section are accordingly grouped with the cases of obvious dangers and the knowledge possessed by the plaintiff. *Supra*, §§ 90-99, 100, 101, 111-113. This result has not been reached without strong opposition. Thus, in the recent case of *Davis v. Forbes*, 171 Mass. 548, a boy employed by the defendant to train and ride colts, and of two years' experience in the business, was injured by a defective stirrup strap given him by the foreman, (572)

no prudent man would take it, and then it is possible for the court to say, as matter of law, that the plaintiff, through his carelessness, brought the injury on him-

and used for three days. There was evidence from which the defendant's negligence could be found, and it was held, as a matter of law, that the plaintiff could not recover. The court says: "There seems to have been what amounted to a common examination of the strap by the plaintiff and Abbott, and though the plaintiff relied to some extent, as was natural, on Abbott's judgment, he appears to have been satisfied himself, from the test that was made in his presence, that the strap was suitable for use, as he proposed to use it in the condition in which it was. No complaint was made that the test was not a reasonable one, and not such as the plaintiff's practical experience commended. There is nothing to show that Abbott's declaration 'that it had got to hold the plaintiff until he got a new one,' and 'here is a pair of old stirrup straps hanging in the case that you will have to use,' coerced the plaintiff into using a strap which he did not think fit, or led him to assume a risk which he would not otherwise have taken." Knowlton, J., dissenting, said that the weight of the evidence showed that the plaintiff did not know and appreciate the risk. "He was undoubtedly influenced by the statements and representations of Abbott. He knew the strap was defective, but he did not know how strong it was. No one can accurately estimate the strength of a piece of old leather from the appearance of it. He saw Abbott pull upon it, but he did not know how much force was applied in pulling. Probably he thought it was stronger than it proved to be." On the general proposition he says: "The employer is under an implied contract or duty to provide safe and proper machinery, tools, and appliances for the employe. There is often evidence on which it is contended that he is guilty of negligence in this particular. In dealing with such a case, upon the question whether the plaintiff is precluded from recovery on the ground that he assumed the risk, it must be assumed that the jury properly might find the defendant guilty of negligence. The question is to be determined in reference to the possibilities of a finding either way on that point. If, looking to the conduct of the defendant alone, the finding ought to be against him, on what ground can the plaintiff be cut off from his right to damages? Under the law of negligence, it is only on the ground that he is himself in fault through failure to exercise proper care, or otherwise. If the

self. Apart from this, the degree of the risk or of the defendant's negligence does not seem to be consid-

facts relied on to establish this defense are merely that he continued to work knowing of the defect which afterwards caused his injury, and if the defect is so slight, viewed in reference to the defendant's duty to provide for his safety, that it is just a little outside of the line which separates due care on the part of the defendant from negligence, the question arises whether there was such a voluntary assumption of the risk on the plaintiff's part as to put him in the same category with the defendant in reference to the alleged negligence. * * * It must be remembered that the rule is applicable only when the plaintiff understands and appreciates the risk. Nothing less than his full understanding and appreciation of it can make his exposure to the danger voluntary, and charge him with negligence whenever the employer is negligent. It is only when his knowledge of the danger is such as to make his conduct as culpable as that of the employer that he can be precluded from recovery on this ground. The question oftenest arises when it is difficult to tell whether there was sufficient danger properly to charge with negligence the employer whose duty it was to know that his appliances were safe; and if the conditions are such that the conduct of the employer in procuring the defective appliance fall only a hair's breadth below the line of due care, nothing less than a full understanding of the danger can charge the employe with negligence in using it when it was provided for him. It will hardly be contended that a hired servant always works at his own risk when he continues in service after discovering that his employer's negligence in failing to repair machinery, or in introducing unsafe machinery, has somewhat increased the perils of his situation. So to hold would altogether deprive the employe of the benefit of the salutary provision of law which makes it the duty of the employer to provide proper tools and machinery with a view to his safety. It is often consistent with due care for him to continue in the service when he knows that the provision for his safety is not as good as it should be. He may think that the danger is not great enough reasonably to require him to refuse to work. That full knowledge and appreciation of the risk on the part of the plaintiff are essential to the maintenance of this defense in cases of this kind has repeatedly been held, and I am not aware that any different doctrine has been enunciated. * * * That the danger is obvious is not necessarily enough to (574)

ered material. When the danger is not obvious to the plaintiff, or when, from circumstances attending his continuance in the service,¹⁷⁸ different inferences may be drawn, the questions of his knowledge, appreciation, and voluntary acceptance of the risk are all to be submitted to the jury.

§ 114c. Indiana.

"If it be found that there is some breach of duty on the part of the master, and it be further found that, with knowledge of this breach, the servant continues in the service, not notifying the master of the breach,

defeat the plaintiff on this ground, although it may warrant a finding by a jury against him. The danger may be so great and so obvious that, in any possible view of the evidence, the general judgment of common men would at once condemn his conduct in continuing to work as careless. In such a case, it would be the duty of the court to order a verdict against him on the ground of a want of due care; but it would not necessarily follow that he voluntarily assumed the risk, so as to come within the doctrine, *Volenti non fit injuria*. He might have been stupid or inattentive, and merely careless in not ascertaining the nature and extent of the danger. To decide against a plaintiff on this ground involves an affirmative finding of fact. The negligence which is fatal to his case is not merely an omission to take proper precautions. It is positive negligent action. It is a voluntary exposure to a well-understood danger, so great that due care requires him to avoid it. The defendant must establish the plaintiff's knowledge and appreciation of the risk and voluntary assumption of it, if he would prevail when on other grounds the plaintiff's case might be decided in his favor. When a fact is to be established by evidence, a court can seldom say, as matter of law, that it is proved. Where the plaintiff has the burden of proof to show the defendant's negligence, or his own due care, the case is different. Then the court must determine, as matter of law, in the first instance, whether any evidence has been introduced in support of the propositions."

¹⁷⁸ *Infra*, § 107 (fear of discharge); § 115 (complaint and promise of repair).

and receiving no assurances that the defect or negligence will be repaired, the servant will be deemed to have assumed the hazard of such defect or breach, and to have waived a right of recovery for injury therefrom."¹⁷⁹ "To this general rule there are exceptions, such as those arising from the master's promise to repair, or his ordering the servant to some work or place out of the line of his regular employment."¹⁸⁰ "The knowledge of the danger adds it as one of the incidents of the employment which the employe assumes. It becomes a danger which his continuance in the master's service makes an incident of the service, and, when it takes this character, the master is no longer bound to answer for the employe's safety, so far as it is imperiled by the danger voluntarily and knowingly assumed. The knowledge, in conjunction with the continuance in the service, operates as a waiver of the right to make the master responsible. * * * The duty which the employer is under is materially affected by the element of knowledge, and, unless a duty is shown, of course there can be no actionable negligence, since a duty lies at the foundation of every right of action on the negligence of a defendant. It must follow, in order to show a breach of duty creating a cause of action for its breach, that it is necessary to aver that the employe was ignorant of the default of the employer which increased the perils of the service."¹⁸¹

¹⁷⁹ Bedford Belt Ry. Co. v. Brown, 142 Ind. 659, 664; Louisville & N. R. Co. v. Orr, 84 Ind. 50; Evansville & T. H. R. Co. v. Duel, 134 Ind. 156; Lynch v. Chicago, St. L. & P. Ry. Co., 8 Ind. App. 516.

¹⁸⁰ Louisville, N. A. & C. Ry. Co. v. Quinn, 14 Ind. App. 554; Rietman v. Stolte, 120 Ind. 314; Brazil Block Coal Co. v. Hoodlet, 129 Ind. 327. See supra, §§ 105-107.

¹⁸¹ Louisville, N. A. & C. Ry. Co. v. Sanford, 117 Ind. 265, 267 (fall of bridge); supra, § 87 (pleading).

There must be a defect or danger for which the master is responsible. The servant must either actually know of it, or else the danger must be such that by the exercise of ordinary diligence he could know of it;¹⁸² and he must know, not only the existence of the defect, but that there is danger to him in it.¹⁸³ The servant may properly rely on the care of the employer in performing the obligations cast upon him, and is not bound to anticipate that these obligations will be disregarded.¹⁸⁴ Reasonable care does not require him to search for latent defects, even though he has an equal opportunity with the master to discover them.¹⁸⁵ The knowledge with which he is chargeable is of the open and obvious dangers which he must know, either through the knowledge common to men, or which he could not escape observing save by carelessness.¹⁸⁶

The court applies the same rule in regard to knowledge possessed by the servant in cases where the danger exists upon entering the employment, and where it subsequently arises. Having found the fact of the plaintiff's knowledge and appreciation of the danger, the court infers, as a matter of law, from his continuance in service with such knowledge, that he voluntarily consented to waive the breach, and undertake the risk.

¹⁸² *Jenney Electric Light & Power Co. v. Murphy*, 115 Ind. 566; *Indiana, Illinois & Iowa R. Co. v. Bundy*, 152 Ind. 590 (unboxed wires).

¹⁸³ *Rogers v. Leyden*, 127 Ind. 50.

¹⁸⁴ *Supra*, §§ 111-113.

¹⁸⁵ *Louisville, E. & St. L. R. Co. v. Berry*, 2 Ind. App. 427, 431; *Salem Stone & Lime Co. v. Tepps*, 10 Ind. App. 516, 518; *supra*, § 112,

¹⁸⁶ See *supra*, §§ 93, 95, 96, where cases are collected.

§ 114d. Alabama.

The rule is thus stated: "If the employe, while engaged in the service, acquires knowledge of any defects in the materials, machinery, or instrumentalities used, and notice thereby of an increased risk of danger, and afterwards continues in the service without objection or notice to the employer, he assumes the increased risk himself; but he may notify the employer of the defect, and continue in the service for a reasonable time, relying on the promise of the employer to remedy the defect; yet, if the defect is not remedied within the promised time, his further continuance in the service is at his own risk, and he is guilty of contributory negligence."¹⁸⁷

If the plaintiff has not actual knowledge of the defect, it would seem that his duties must be such as to charge him with knowledge in order that the rule may be applied.¹⁸⁸ "As to the defects in the tramway, there is no direct evidence that he had any knowledge of them. The most that can be said is that while it was no part of his duty or business to be on the lookout for such defects, yet he had opportunities in the course of his employment to observe these defects, the oppor-

¹⁸⁷ Birmingham Ry. & E. Co. v. Allen, 99 Ala. 359 (unlocked switch known). See, also, *infra*, § 115.

¹⁸⁸ Eureka Co. v. Bass, 81 Ala. 200 (foreman of blasting killed by defective fuse); Louisville & N. R. Co. v. Hall, 87 Ala. 708, 720 (knew of low bridge); Louisville & N. R. Co. v. Stutts, 105 Ala. 368 (dangerous trestle where plaintiff switched cars); Bridges v. Tennessee C., I. & R. Co., 109 Ala. 287 (had complained of his defective locomotive); Alabama Great Southern R. Co. v. Davis, 119 Ala. 572 (knew of defective switch, but told it was repaired). See, also, *supra*, §§ 93, 95, 96 (obvious dangers); §§ 112, 113 (opportunity to discover defect).

tunities and the defects being of such character as to afford ground for an inference that he had observed and did know of the defects. But this inference was for the jury. * * * It is always for the jury to draw or not to draw inferences from the facts proven, unless it is a matter of legal presumption, which this clearly is not."¹⁸⁹

The rule, both as a matter of pleading and of statement, is rested upon contributory negligence.¹⁹⁰ "Whether continuing in the service after discovering the defect constitutes contributory negligence depends in a great measure upon its nature and extent. Unquestionably, when the danger is so apparent that injury appears to be inevitable, the employe is not justified in continuing in the service. No man is bound to subject himself to certain and inevitable injury, endangering life, in rendering service to another. Continuance in service under such circumstances would be reckless, and, if death ensued, suicidal. But that the injury should appear to be unavoidable is not requisite. When injury is imminent,—when the appearance of injury is of a degree greater than that which produces the impression that injury may result; when it leaves no room for reasonable doubt,—continuing in the service after knowledge of the defect causing the injury, and its nature and extent, must be regarded as contributory negligence. The general rule is as definite as any we can lay down consistent with the nature of the right of action of the employe and the defense

¹⁸⁹ Whatley v. Zenida Coal Co., 122 Ala. 118, 129.

¹⁹⁰ Supra, § 87. But see Birmingham Ry. & E. Co. v. Allen, 99 Ala. 359, 374 (where it is placed on the ground of *volenti non fit injuria*).

allowed to the employer. By this rule an employe does not exercise ordinary care in not quitting the service when injury is so imminent and impending that a prudent man would not continue therein under like circumstances."¹⁹¹

§ 114e. Colorado.

The general rule has been followed in Colorado. "If with knowledge, or with means of knowledge equal to his employer's, of defects in the machinery, the servant, without remonstrance, voluntarily continues in the service, a waiver of his claim for damages is said to have taken place, or his conduct is regarded as negligence contributing to the resulting injury. It is to be observed, however, that caution should be exercised in applying this rule to defenses where the employe's equal means of knowledge is the ground relied on. The nature of his employment, including his duties and responsibilities; the character of the machinery or appliances in question, and the acquaintance therewith he could reasonably be expected to possess; the proximity and relation of such machinery and appliances to his daily labors; the frequency of his opportunities for observation,—these and other matters, including, of course, the reasonable skill and ability which he guaranties by engaging in the service, may each or all enter into an appropriate consideration of the subject."¹⁹² "By voluntarily continuing in the service with knowledge, or means of knowledge equal to his

¹⁹¹ Highland Ave. & B. R. Co. v. Walters, 91 Ala. 435, 442. "Reasonably to be apprehended" is the phrase used in Eureka Co. v. Bass, 81 Ala. 200.

¹⁹² Wells v. Coe, 9 Colo. 159, 163.

employer's, of any defect in the appliances or the machinery used, and without objection, or promise on the part of the employer to remedy the defect, the employe assumes all the consequences that result from such defect, and waives the right to recover for injuries caused thereby."¹⁹³

Assuming that the employe knows and appreciates the risk, continuance in the service is, as a matter of law, a waiver of the right to claim damages for his employer's fault. The fact that he gave notice of the defect does not change the inference to be drawn from his conduct.¹⁹⁴

It would seem that the court can only say, as a matter of law, that he knew and appreciated the risk when it is such that a person of the plaintiff's experience must have known it, if he used ordinary care in observing the conditions surrounding him.

§ 114f. Federal courts.

The rule that a servant who, knowing and appreciating the danger, remains at work, cannot, as a matter of law, recover for an injury, has been recognized in the federal courts, and the reason usually assigned is that the plaintiff was negligent in encountering the risk.¹⁹⁵ Thus, where the mate of a vessel

¹⁹³ *Denver Tramway Co. v. Nesbit*, 22 Colo. 408, 412; *Davis v. Graham*, 2 Colo. App. 210; *Colorado Fuel & Iron Co. v. Cummings*, 8 Colo. App. 541. *Supra*, §§ 93, 95, 96, 111-113.

¹⁹⁴ *Colorado Cent. R. Co. v. Ogden*, 3 Colo. 499.

¹⁹⁵ *Washington & G. R. Co. v. McDade*, 135 U. S. 554; *Union Pacific Ry. Co. v. O'Brien*, 161 U. S. 451; *Texas & P. Ry. Co. v. Archibald*, 170 U. S. 665; *Dillon v. Union Pac. R. Co.*, 3 Dill. 319, Fed. Cas. No. 3,916. The decision in *Smith v. Baker* [1891] App. Cas. 325, is said not to be approved in the federal courts. *McPeck v. Central V. R.*

warned the plaintiff to take care about the strain to which he subjected a rope, and the plaintiff, knowing the defective condition of it, continued at his work and was injured, it was held that he both acquiesced in the wrongful act and was negligent, and could not recover.¹⁹⁶ It seems that the plaintiff's knowledge and appreciation of the danger is to be determined by the same rules that obtain when he accepts the risks of obvious dangers upon his entry into the employment;¹⁹⁷ but in a case where a switchman was injured by catching his foot in a crack in the planking of the yard, and the defect had existed for two months, it was held that he could not be presumed to know of it. However, had all the planking been in that condition when he entered the service, he would have assumed the risk.¹⁹⁸

An exception to the general rule that remaining at work with knowledge of an obvious danger is an assumption of it is made in favor of seamen. "A seaman aboard ship is bound to perform such services as may be required of him in the line of his employment. He cannot hold back and refuse prompt obedience because he may deem the appliances faulty or unsafe. Masters

Co. (C. C. A.) 79 Fed. 590; *Volk v. Sturtevant Co.* (C. C. A.) 104 Fed. 276.

¹⁹⁶ *Hansen v. The Julia Fowler*, 49 Fed. 277; *Mason & O. R. Co. v. Yockey* (C. C. A.) 103 Fed. 265 (for jury to say whether engineer should have quit when he became aware of a leaky valve causing apron of engine to be icy); *Clyde v. Richmond & D. R. Co.* (C. C. A.) 72 Fed. 121 (Court: Knowing of defective handhold, he used it to mount car); *Southern Pac. Co. v. Yeargin* (C. C. A.) 109 Fed. 436 (For jury: Knowing lack of headlights, negligence in remaining).

¹⁹⁷ *Supra*, §§ 93, 95, 96, 111-113.

¹⁹⁸ *Valley Ry. Co. v. Keegan* (C. C. A.) 87 Fed. 849; *Hunt v. Kane* (C. C. A.) 100 Fed. 256.

of ships exercise large powers, and they may legally compel obedience to orders. A seaman necessarily surrenders much of his personal liberty and freedom of action, and he is never at liberty, like the landsman, to quit or make much objection to the circumstances surrounding the work commanded."¹⁹⁹

§ 115. Promise to repair.

When a servant, knowing of a defect or danger for which his master is responsible, complains of it to the master or his representative, and is promised that the danger will be removed, the presumption arising from his continuance at work with knowledge of the danger is rebutted, and, if he suffer an injury therefrom during the period in which he may reasonably expect the promise will be fulfilled, he may recover.

This rule does not permit the servant carelessly to expose himself to danger, nor does it prevent his assumption of the risk if he continues at work after a reasonable time for the performance of the promise has passed without the removal of the danger.

In the preceding section²⁰⁰ it was noted that the general rule throughout the United States was that if a servant, knowing and appreciating the danger arising from the breach of some one of the master's obligations to him, continued at work, the only inference that could properly be drawn from this fact was that he was negligent or consented to the breach and its resulting danger, and could not, therefore, recover. This inference may, however, be rebutted by evidence

¹⁹⁹ *Lafourche Packet Co. v. Henderson* (C. C. A.) 94 Fed. 871, 876; *Eldridge v. Atlas S. S. Co.*, 134 N. Y. 187. So with a convict. *Dalheim v. Lemon*, 45 Fed. 225.

²⁰⁰ *Supra*, § 114.

showing that the plaintiff, in fact, did not consent to or waive the defendant's breach, and willingly take the risk of injury upon his own shoulders. The question in each case is whether the evidence offered by the plaintiff along this line is sufficient to overcome the inference which, as a matter of law, arises from his continuance at work; and this, like all matters of proof, must first be passed upon by the court.

It is now well established that if a servant knows of a breach of his master's obligations to him by which his occupation is made more hazardous, and complains of it, and receives a promise that it will be repaired, he may, for so long a time as it is reasonable for him to expect that the master's engagement will be fulfilled, continue at work; and if, during that period, he is injured by reason of the danger complained of, the question of his acceptance of the risk is a fact to be determined by a jury.²⁰¹

²⁰¹ When an employe, "in the line of duty, conveys to the employer notice that an impairment of the instrumentalities furnished him to work with has passed the stage of reasonable safety, and has increased the hazards of the employment beyond the limit of the risk assumed, and the employer, recognizing his default, to avoid an immediate suspension of work, requests and induces the employe to go on, by a promise to repair, then the law charges the former with an assumption of the extraordinary risk pending his promise to repair. At this point, the parties are no longer upon equal footing. The servant is without fault, and pursues the work with greater peril to himself than the relation requires, while the master, who is in default, requests and induces a temporary suspension of his duty, a transient indulgence of his negligence, for his own pleasure or beneficial purpose. A promise to repair is a confession to a breach of duty, and when a master, to right himself, requests and induces a postponement, either for convenience or profit, no principle of justice will lay the burden of delay upon the unoffending servant. The whole question is bottomed upon the wrong of the (584)

The question of the plaintiff's knowledge and appreciation of the danger becomes of slight importance, since, in order to bring himself within the exception, he must show that he made complaint of the negligence,

master, and it is sophistry to argue that the servant, by confiding in the master's promise, for a reasonable time in which to cure the defects, clearly obvious though they be, should be chargeable with having thereby waived the master's duty to him, and assumed the additional risk himself." *McFarlin Carriage Co. v. Potter*, 153 Ind. 107, 113 (circular saw). "He may notify the employer of the defect, and continue in the service for a reasonable time, relying on the promise of the employer to remedy the defect; yet, if the defect is not remedied within the promised time, his further continuance in the service is at his own risk, and he is guilty of contributory negligence." *Birmingham Ry. & E. Co. v. Allen*, 99 Ala. 359 (switch). "There can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." *Hough v. Railway Co.*, 100 U.S. 213, 225 (defective engine). "If machinery upon which a servant is employed has become dangerous, and the servant has complained of it, and has been promised that it shall be repaired, but is injured before the defect is remedied, and while he is reasonably expecting the promise to be performed, the promise is a circumstance to be considered by the jury in determining whether he has assumed the risk in the meantime, and whether he was using due care in working when he knew there was danger. But no case, we believe, has gone the length of deciding that the promise entitles the servant to recover as a matter of law. * * * And if, as supposed in the request, the time for performance has gone by before the accident, and, as must have been the fact, the servant knows that the repair has not been made, there is a very strong argument that the servant is no longer relying upon the promise, but has decided to take the risk." *Counsell v. Hall*, 145 Mass. 468, 470. See, also, *Holmes v. Clarke*, 6 Hurl. & N. 349; *Clarke v. Holmes*, 7 Hurl. & N. 537 (machine becoming unfenced); *Yarmouth v. France*, 19 Q. B. Div. 647.

and this fact, of course, discloses both a knowledge of it and an appreciation that it might cause him injury.

The rule adopted applies only where there has been a breach of duty by the master, for a plaintiff obviously cannot recover unless the person whom he seeks to charge has been negligent in regard to him. Thus, it cannot apply to dangers which existed at the beginning of the employment, and which the plaintiff must have known, nor to dangers arising afterwards, if the servant has once assumed the risk of them. It is said that this exception does not extend to defects in such simple instruments or appliances as ladders, hoes, handsaws, and the like, since as to such things the master does not possess knowledge superior to the servant's, and the dangers arising are easily to be avoided.²⁰² However, the master is bound to furnish a stock of suitable appliances for his servant's use; and if he fails to fulfill this obligation, but, upon complaint, promises to do so, the servant does not assume the risk of using the defective ones.²⁰³

The master is not bound to conduct his business in the safest possible way, and if the method adopted is reasonably safe he is not negligent. Thus, a servant cannot, by complaining that another method or other machinery or appliances should be adopted, charge the master with failure of duty towards him; and this is undoubtedly the case where the servant has already taken the risk of the business conducted as it is.²⁰⁴

²⁰² Meador v. Lake Shore & M. S. Ry. Co., 138 Ind. 290.

²⁰³ Lehigh Valley Coal Co. v. Warrek (C. C. A.) 4 Fed. 866 (blocks for blocking cars became worn). See, also, Indianapolis & St. L. Ry. Co. v. Watson, 114 Ind. 20 (lantern).

²⁰⁴ Gowen v. Harley (C. C. A.) 56 Fed. 973 (Court: Plaintiff (586))

The character of the danger is immaterial, provided it arises from the negligence of the master; and thus a promise to repair is equally effectual whether it relates to obvious or to latent defects. The character of the danger is only of consequence as it affects the care which the plaintiff must exercise in regard to it.²⁰⁵

When it is found that the master has been guilty of negligence towards the plaintiff, complaint by the latter does not, of itself, rebut the presumption that by his continuance at work with knowledge he assumed the risk. "The promise of the master is the basis of the exception. If the promise be absent, the exception cannot exist."²⁰⁶ Thus, where an engineer knew of a defect in his locomotive, and complained, but said he would worry along with it till the end of the month, when, unless it were repaired, he would leave the service, it was held that, as there was no promise, he had assumed the risk.²⁰⁷

As the complaint is the foundation of the promise, it should point out the defect with some degree of accuracy, so that the master may know what are the repairs needed. Simply saying that a car is in bad shape is not enough.²⁰⁸ The complaint may be made to the master himself or to some one superior to the plaintiff,

asked for skids on which to move boxes. He had worked without them for three months, and the danger was obvious); *Homestake Mining Co. v. Fullerton* (C. C. A.) 69 Fed. 923 (covering exposed coupling).

²⁰⁵ *McFarlan Carriage Co. v. Potter*, 153 Ind. 107.

²⁰⁶ *Indianapolis & St. L. Ry. Co. v. Watson*, 114 Ind. 20 (brakeman asked for lantern).

²⁰⁷ *Bridges v. Tennessee C., I. & R. Co.*, 109 Ala. 287 (Court); *Lewis v. New York & N. E. R. Co.*, 153 Mass. 73.

²⁰⁸ *Burlington & C. R. Co. v. Liehe*, 17 Colo. 280.

and the promise may be made by the master or by his representative. It would seem that the agent receiving the complaint or making the promise must be one who has apparent authority in the premises, and that a promise made by such a one will bind the master; but whether or not the agent in fact has authority to bind the master is immaterial if his position in the employment, and the general character of the duties he performs, are such as would lead the plaintiff reasonably to suppose that he was invested with the requisite power.²⁰⁹ Of course, if the plaintiff himself is charged with the duty and has the power to effect the necessary repairs, and neglects to do so, the fault is his own, and the reasons for this exception fail.²¹⁰

The promise, when made, must be such as leads the plaintiff to believe that the repairs will be effected at once, or as soon as practicable, for unless the promise is of this character the plaintiff does not continue at work on the faith of it. Thus, where the plaintiff complained of a defect, and the master promised to repair it "as soon as the present order was filled," it was held that, between the time when the complaint was made and when the order was filled, the plaintiff, by continuing at work, assumed the risk, and could not recover for an injury happening in the period.²¹¹ In other

²⁰⁹ *Parody v. Chicago, M. & St. P. Ry. Co.*, 15 Fed. 205 (complaint to yardmaster in regard to defective drawbar); *Dells Lumber Co. v. Erickson* (C. C. A.) 80 Fed. 257 (superintendent, who did not in fact have authority); *Homestake Min. Co. v. Fullerton* (C. C. A.) 69 Fed. 923 (foreman); *Dwyer v. Nixon* (C. C. A.) 108 Fed. 751 (statement of fellow servant not sufficient).

²¹⁰ *Silvia v. Wampanoag Mills*, 177 Mass. 194 (Court: Defective shipper).

²¹¹ *Standard Oil Co. v. Helmick*, 148 Ind. 457; *Indianapolis & St. L. Ry. Co. v. Watson*, 114 Ind. 20, 30.

words, the promise must be the inducement for the plaintiff to continue at work, and the promise and inducement must concur.

The effect of the promise is well described in a case where the plaintiff was injured because of the rotten condition of planking in a pier, of which he had complained. "It is a question how far and under what circumstances a servant, the performance of whose duties becomes dangerous through the neglect of the employer to keep in proper repair the premises where he works, is justified in relying upon the employer's promise to amend the defect and remove the danger, when he himself has full knowledge of the defective and dangerous condition which exists, and the risk which he runs by continuing in the service. * * * The plaintiff seems to have called the attention of the superintendent to the condition of the pier, and to have urged its repair, not on his own account, nor because the discharge of his duties was rendered more dangerous, nor because he had any intention of leaving if the pier was not repaired. But he seems to have acted in the interests of the company, and in order to prevent strangers and others coming onto the pier, and not knowing where to go, from getting hurt. The natural and reasonable inference from his conversations is that he expected to remain there, and, knowing the condition of the pier, expected to take the risk. * * * No case, we think, has gone so far as to hold that where the servant does not complain on his own account, and continues in his employment with full knowledge of the risk, he can recover of the master, because the latter, when the defective condition was called to his attention by the serv-

ant, gave assurances, which did not induce the servant to remain, that the defect should be remedied.”²¹²

Whether or not the plaintiff has brought himself within this exception to the rule that continuance in service with knowledge of the risk is an assumption of it is ordinarily a question of law for the court; that is, the court must determine whether there was a duty to the plaintiff in regard to the effect which may or may not have been performed by the defendant, whether the plaintiff seasonably complained of it, and whether the promise was of such a character as reasonably induced him to continue at work in the hope that the defect would be remedied. But the question how long the servant is exempted from assuming the risk under these circumstances is ordinarily a fact to be determined by the jury.

Reasonable time.

From the moment when the promise is made and acted on, the plaintiff ceases to assume the risk.²¹³ “The carrying of the risk by the employee will be implied to continue only for a reasonable time after the making of the promise by him to remove the danger producing it. The injury, in other words, must have occurred within the time at which the defects were promised to be removed. If the employee continues to expose himself to the danger by remaining in the service longer than this, he does so in face of the fact that the promise of the employer is violated, and that he has no reason-

²¹² *Lewis v. New York & N. E. R. Co.*, 153 Mass. 73, 75, 76 (Court).

²¹³ *McFarlan Carriage Co. v. Potter*, 153 Ind. 107.

able expectation of its fulfillment. He can no longer, therefore, rely upon the promise, and must know that his continuance in service under such circumstances is equally as hazardous and hopeless of remedy as if no assurance or promise had ever been made. A promise already broken can afford no reasonable guaranty of the fulfillment of any expectation based on its disappointed assurances. For a servant or employe to persist in exposing himself to danger on the faith of such a promise is a waiver of the defects agreed to be remedied by his employer. The risk, therefore, again becomes his own, and his conduct, as we have said, although not necessarily or *per se* negligent, may or may not become negligent, according to the circumstances of the particular case."²¹⁴

When, therefore, a reasonable time has passed without the fulfillment of the promise, the presumption from the servant's continuance in service with knowledge arises again in full force and with the same effect upon his rights as if he had never complained or received a promise of remedy. What is a reasonable time is a question of fact depending upon the circumstances of the particular case, and ordinarily to be determined by the jury. No rule can be laid down.²¹⁵

²¹⁴ Eureka Co. v. Bass, 81 Ala. 201, 214.

²¹⁵ Counsell v. Hall, 145 Mass. 468 (Jury: Injury fourteen days after promise to repair water gauge on boiler); Daugherty v. Midland Steel Co., 23 Ind. App. 78 (Jury: Six days not too long to repair traveling crane); East Chicago I. & S. Co. v. Williams, 17 Ind. App. 573 (Jury: Billet rollers); McPeck v. Central Vt. R. Co. (C. C. A.) 79 Fed. 590 (trains did not signal approach, and plaintiff worked for twenty days after promise. Court held, too long a time); Detroit Crude-Oil Co. v. Grable (C. C. A.) 94 Fed. 73 (Court: Nine months too long for repairs of projecting bolts in fly wheel).

The plaintiff should use care to see whether the promised repairs were made or not, but he has a right to rely on the promise given him, and is not bound to make a close inspection. Thus, when an engineer discovered a defect in the "pilot plow" on his engine, reported it, and was promised that it would be repaired, and he then was sick for a week, and on his return was directed to run the engine at night in a snowstorm, it was held that he had a right to assume that the repairs had been made, and the mere fact of his using the engine did not, under the circumstances, imply an assumption of the risk in the absence of other evidence.²¹⁶ So where, after the promise, the room in which the plaintiff worked was shut down for four days, and he was injured the first morning he started to work again.²¹⁷

Contributory negligence.

The fact that a promise has been given to remedy the defect does not, however, justify the plaintiff in continuing at work when the danger is so great that a reasonably prudent man would not undertake it. Contributory negligence is a defense in cases under this exception where the maxim, *Volenti non fit injuria*, may not be applicable. But this is one of the instances where it is not always necessary closely to distinguish which defense bars the plaintiff's recovery.²¹⁸

²¹⁶ Northern Pac. R. Co. v. Babcock, 154 U. S. 190 (Jury).

²¹⁷ Keewan v. Walker, 172 Mass. 56 (Jury: Machine repeated).

²¹⁸ Levesque v. Janson, 165 Mass. 16 (Court: Using rotten harness on vicious horse); Indianapolis Union Ry. Co. v. Ott, 11 Ind. App. 564 (defective lantern); Romona Oolitic Stone Co. v. Phillips, 11 Ind. App. 118 (defective belts); District of Columbia v. (592)

Cases in which the plaintiff relied upon a promise to repair are collected in the notes.²¹⁹ In Indiana, as the plaintiff has the burden of proving that he did not assume the risk, he must plead the promise to repair;²²⁰ but he need not set out the time needed for making the repairs.²²¹

§ 116. Breach of statutory obligation.

Dangers caused by the breach of an obligation imposed by statute on an employer may be assumed by the servant, whether they exist at or after the beginning of the employment, provided he knows not only the danger, but the breach of duty, and consents to waive it.

When a statute passed for the protection of a certain class of individuals imposes a duty as to them upon an employer of labor, the authorities are in conflict upon the question whether one of the class to be benefited who knows of a violation of this duty by his master may, by his conduct in reference to it, disentitle himself to recover for an injury. Several cases have held that the maxim, *Volenti non fit injuria*, does not

McElligott, 117 U. S. 621 (plaintiff continued working under an overhanging gravel bank, though foreman failed to send a watchman, as he promised).

²¹⁹ Packer v. Thomson-Houston Electric Co., 175 Mass. 496 (Jury: Machine repeated); Burns v. Windfall Mfg. Co., 145 Ind. 261 (defective roadbed); New Jersey & N. Y. R. Co. v. Young (C. C. A.) 49 Fed. 723 (defective air brake); Cross Lake Logging Co. v. Joyce (C. C. A.) 83 Fed. 989 (incompetent servant, and promise to discharge or watch him).

²²⁰ Becker v. Baumgartner, 5 Ind. App. 576; Daugherty v. Midland Steel Co., 23 Ind. App. 78; Lake Shore & M. S. Ry. Co. v. Stupak, 108 Ind. 1. See, also, Dillon v. Union Pac. R. Co., Fed. Cas. No. 3,916, 3 Dill. 319.

²²¹ Daugherty v. Midland Steel Co., 23 Ind. App. 78; McFarlan Carriage Co. v. Potter, 21 Ind. App. 692, 153 Ind. 107.

apply to the breach of a statutory obligation, but it is believed that these cases do not rest upon a sound principle.

When a duty and a penalty for its violation are imposed by statute, the question whether a person injured by the breach of the obligation may recover depends upon the terms and purpose of the enactment. If the statute is passed for the benefit and protection of the public at large, the general rule is that a private action will not lie, and the only remedy is an exaction of the penalty prescribed by the act. If, however, the statute is for the benefit of a class of individuals, the better opinion is that a private action will lie, although the statute by terms affixes a penalty on its violation. Of this latter class of acts are those regulating the employment of women and children, the inspection and protection of buildings and machinery, and the conduct of dangerous occupations. The statute may create a new duty, or it may affix a penalty to a duty which was, previous to its passage, recognized at common law. When an action is brought under the statute, proof of the violation of it makes out the plaintiff's case, and, if the action is brought for the breach of a common-law duty, evidence of the violation of the statute is *prima facie*, and in some jurisdictions conclusive, evidence of negligence.²²²

In determining whether the maxim, *Volenti non fit injuria*, applies to a breach of a statutory obligation, the distinction heretofore made between dangers existing at the time of the employment and dangers subsequently arising may be disregarded. Where no ques-

²²² *Supra*, § 51.

tion of statutory duty enters, it was seen that an occupier of premises owes no duty to the public in regard to their condition, but that, if he invites people to enter upon them, he becomes bound not to lead them into danger, and consequently the duty arises, by virtue of this invitation, to protect and warn his visitors against all dangers known to the occupier and not to them. As to the dangers known to them, the visitors take the premises as they find them, and the act of accepting employment is, as a matter of law, a voluntary assumption of the risks.²²³ It was also seen that after the employment is accepted, and the mutual duties and disabilities established, the master may only escape the consequences of a violation of his obligations by a voluntary consent on the part of the servant to waive the breach and undertake the risk.²²⁴ The act of the servant in the one case does away with the duty, and in the other does away with the consequences of its breach. But the legislature may, for example, say that every employer shall be bound to keep his machinery guarded, or not to employ children, and in such case it may create a new duty or impose a penalty for what might in some cases be a common-law duty. Such a duty is owed, not only to the persons then employed, but to all who may become servants. A servant who goes to work in a factory where the statute is disregarded goes to work under a master who has already committed a breach of duty towards the public and towards him, and this breach is committed whether the danger arising from it be known or unknown to the servant.

²²³ *Supra*, § 92.

²²⁴ *Supra*, § 114.

When the servant knows and appreciates the danger, it is clear that he would have waived the breach upon entrance into the employment, had there been a common-law duty, and the question is whether the fact that the duty is statutory, subjecting the master both to penalty and action, changes the rule. If it does not, the plaintiff may waive this breach of duty, as he may waive a breach of a common-law duty, by a voluntary consent to undertake the risk. This seems to be the view of Bowen, L. J., where, after saying that no duty is owed an invited person who knows the condition of the premises, he goes on: "There may again be concurrent facts which justify the inquiry whether the risk, though known, was really encountered voluntarily. The injured person may have had a statutory right to protection, as where an act of parliament requires machinery to be fenced. The case of *Clarke v. Holmes* (7 Hurl. & N. 937) is a case of that sort, and has been so explained subsequently by judges of authority. Or, again, the plaintiff may have a common right or individual right at law to find these particular premises free from danger, as in the case of lands on which a market or fair has been held."²²⁵ Or, as Fry, L. J., said in the same case: "Knowledge is not of itself conclusive of the voluntary character of the plaintiff's actions. There are cases in which the duty of the master exists independently of the servant's knowledge, as when there is a statutory obligation to fence machinery."²²⁶ This rule was also recognized by Bramwell, B.: "Assuming, however, that he did share his em-

²²⁵ *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 696.

²²⁶ *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 703

ployer's knowledge, it must be remembered that the liability of the defendants here is not at common law, but by statute. They are in default to begin with, and the mere circumstance that the deceased entered on a dangerous employment does not exonerate them, unless he knew the nature of the risk to which, in consequence of that default, he was exposed."²²⁷

It is clear that contributory negligence will bar a plaintiff's recovery when the defendant has violated a statutory obligation, for the reason that the defendant's breach is, in such case, not the proximate cause of the injury.²²⁸ But where the plaintiff is himself in the exercise of due care his recovery will be barred, if at all, only when he is brought within the maxim, *Volenti non fit injuria*.

In an English case²²⁹ a statute required that ropes and cages in mines should be inspected daily. The requirement was habitually violated, and the plaintiff knew it. A fire injured the rope, and the plaintiff was told he had better test it. He did not, and was injured by its breaking. The court held that the plaintiff came within the maxim, and could not recover. In another case,²³⁰ where the plaintiff began work upon a machine which was fenced, but later the fencing was removed, and upon his complaint he was promised that it should be replaced, he recovered. It was said:

²²⁷ Britton v. Great Western Cotton Co., L. R. 7 Exch. 130, 41 Law J. Exch. 99.

²²⁸ Supra, § 51, note 134.

²²⁹ Senior v. Ward, 28 Law J. Q. B. 139.

²³⁰ Holmes v. Clarke, 6 Hurl. & N. 349; Clarke v. Holmes, 7 Hurl. & N. 937. See, also, Britton v. Great Western Cotton Co., L. R. 7 Exch. 130; Shields v. Murdoch, 20 Rettie, Ct. Sess. Cas. (4th Ser.) 727.

“Where machinery is required by act of parliament to be protected so as to guard against danger to persons working it, if a servant enters into the employment when the machinery is in a state of safety, and continues in the service after it has become dangerous in consequence of the protection being decayed or withdrawn, but complains of the want of protection, and the master promises to restore it, but fails to do so, we think he is guilty of negligence, and that, if any accident occurs to the servant, he is responsible.” But neither of these cases holds the point, for the first is really a case of contributory negligence, and the second, on appeal, was supported on the ground of negligence apart from the statute.

In *Baddeley v. Earl Granville*²³¹ the question was distinctly raised, and it was held that *volenti non fit injuria* did not apply to the breach of a statutory obligation. A statute required a banksman to be present at the mouth of a pit when miners were going up or down. During the night it was the defendant's practice, however, to dispense with a banksman, and of this the plaintiff was well aware. The injury happened in consequence of this violation. The court held that the plaintiff could recover, and said, by Wills, J.: “An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. * * * There ought to be no

²³¹ 19 Q. B. Div. 423, 426. The court considered that the rule in *Thomas v. Quartermaine*, 18 Q. B. Div. 685, did not apply to the breach of a statutory obligation, and that the judge who laid it down did not intend that it should. There seems to be no reason for this ruling. See 13 Law Mag. & Rev. (1887; 4th Ser.) 19. As to contracts waiving the benefit of the act, see *supra*, § 25. (598)

encouragement given to the making of an agreement between A. and B. that B. shall be at liberty to break the law which has been passed for the protection of A. Such an agreement might be illegal. * * * But it seems to me that if the supposed agreement between the deceased and the defendant, in consequence of which the principle of *volenti non fit injuria* is sought to be applied, comes to this: that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others as well as of himself,—such an agreement would be in violation of public policy, and ought not to be listened to.”

To the same effect is *Narramore v. Cleveland, C., C. & St. L. Ry. Co.*,²³² where a statute required railroad companies to block guard rails, and the plaintiff, knowing that the statute was violated, and appreciating the risk, continued in service. The court said: “Assumption of risk is a term of the contract of employment, express, or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant’s duty shall be at the servant’s risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master

²³² 96 Fed. (C. C. A.) 298. Express contracts are invalid. *Supra*, § 25. See, also, *Baltimore & O. S. W. Ry. Co. v. Peterson*, 156 Ind. 364.

violates no legal duty to the servant in failing to protect him from dangers, the risk of which he agreed expressly or impliedly to assume. * * * If, then, the doctrine of the assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize, as against a servant, an agreement, express or implied, on his part, to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant 'to contract the master out' of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that."

In so far as the conclusion in these two cases is based on the ground of a contract to violate the statute, it is unsatisfactory. It has been elsewhere shown²³³ that the doctrine of "assumption of risk" is a disability imposed by the policy of the law upon parties standing in a certain relation to each other, and, although ordinarily

²³³ *Supra*, §§ 82, 83.

attending a contract of hiring, is imposed, not as a term of that contract, but entirely apart from any supposed agreement or understanding of the parties. It is the policy of the law which causes a visitor to assume the obvious risks of an unfenced machine on the premises of the occupier, and not a contract, express or implied, to assume them. The passage of a statute imposing a penalty for maintaining machinery in such a condition neither affects the obviousness of the danger nor the rule of law that a visitor must protect himself against it. Nor does it either make or vary any contract between them. It does, however, give a right of action, and the question is whether this right may be waived; and that would seem to be determined by the public policy which has dictated the whole master and servant law.²³⁴

This is the ground relied upon in *Simpson v. New York Rubber Co.*,²³⁵ where the plaintiff entered an employment where cogs were unguarded, contrary to law, and the court said: "Public policy induces us to hold that this statutory provision cannot be waived." That case was a suit under the statute, but in a later case, where the action was at common law, and the same statute was violated, it was said that public policy required no more rigid enforcement of a duty created by statute than of any other duty; that the reason a plaintiff

²³⁴ *Supra*, § 1.

²³⁵ 80 Hun (N. Y.) 415. The assumption of risks of employment "does not apply to infants under the prescribed age who are injured in managing dangerous machinery, unless such infant, by his or her negligence, contributed in some degree to the injury." *Cooke v. Lalance Grosjean Mfg. Co.*, 33 Hun (N. Y.) 351; *Hickey v. Taaffe*, 32 Hun (N. Y.) 7.

could not recover for injury caused by obvious dangers was not because he had barred himself by contract, but because he had waived the duty, and that, although the obvious risk was caused by a violation of the statute, it might nevertheless be assumed.²³⁶

Public policy is not always a safe ground on which to rest a decision, and what is thought proper to-day, or in one jurisdiction, may later be otherwise regarded. But it may well be doubted if sound policy requires that an employe who knows the danger and appreciates it, and knows his rights under the statute, and is willing to waive them, should be so far considered under guardianship as to be prevented from waiving remedies which affect himself alone. It is better to treat him as a man competent to protect himself than as a child.

These are not statutes passed for the benefit of the public at large, but for the better protection of certain classes, the individuals of which may or may not need the care. The statutes are not criminal, relating to felonies or breaches of the peace, but are police regulations to force the employer by fine to do what in most cases he ought to do without compulsion. The servant consequently has his private action for a violation causing injury to him, and the state has its indictment,

²³⁶ *Knisley v. Pratt*, 148 N. Y. 372. New York now holds that a risk caused by violation of a statute may be assumed. *De Young v. Irving*, 5 App. Div. 499; *Stewart v. Ferguson*, 34 App. Div. 515; *Huda v. American Glucose Co.*, 154 N. Y. 474. In the last case the court found no violation of a statute, and said "that presents a different question." See, also, *E. S. Higgins Carpet Co. v. O'Keefe* (C. C. A.) 79 Fed. 900; *Keenan v. Edison Electric Light Illuminating Co.*, 159 Mass. 379; *Le May v. Canadian Pac. Ry. Co.*, 18 Ont. 314.

whether any injury is caused or not. The remedies are separate and distinct, and a failure by a servant to bring his action does not prevent the exaction of the penalty by the state. It is difficult to see why, if the servant is given an action, he cannot barter it away before the cause of action accrues, as well as fail to bring it when he suffers injury. In neither case is the master's liability to the state affected, and the state ought not to call in the aid of an individual to enforce a policy it is competent itself to protect. For many reasons the servant may prefer to forego the protection, and as this does not change the master's obligation under the statute, or affect the welfare of the state, it should be permitted. The means of protection, through information to the proper authorities, are at hand, if the servant or another chooses to avail himself of them, and, if he is content to work without the safeguards which he has a right to expect, the loss should be his. If the principle expressed in the cases cited is carried to its logical extreme, an employer who had failed to fence his machinery as required by statute would be liable to the mechanic he had hired to remedy the defect, if the latter were injured through the absence of guards; or a man who had agreed to keep his neighbors' roofs clear of snow during the winter, but, failing to do so, is injured by the snow falling upon him as he walked by, could recover, if a municipal ordinance subjected the owner of uncleared roofs to a fine. If the decisions quoted are to be followed, the odd state of affairs will exist of a man who is merely careless being barred, but one who deliberately undertakes a dangerous work recovering.

The true rule is believed to be that a servant, upon

entering the employment or afterwards, may expect that the master will comply with the statute; but if the master does not so comply, and the servant knows the breach and his rights under it and appreciates the risk therefrom, he cannot recover in any case where it appears that he consented to the violation. The maxim, *Volenti non fit injuria*, should apply to such a case, but the questions of fact upon which it is founded should be determined by the court only when the inferences are conclusive.²³⁷

§ 117. Effect of employers' liability act.

The employers' liability act has not affected the principles upon which the assumption of risks by a servant depends. It has excepted certain servants from the class of fellow servants; it has left untouched the defense of contributory negligence; it has left untouched the defense of "*volenti non fit injuria*;" and has given an additional statutory defense.

The chief effect of the act has been to increase the classes of servants for whose negligence the master is responsible; in other words, it has deprived the master of the defense that the plaintiff impliedly contracted to assume the risk of the negligence of those servants who are specified in the several clauses of the statute.²³⁸

Several of the acts expressly provide that the plaintiff must himself have been in the exercise of due care;

²³⁷ See Bramwell, B., in *Britton v. Great Western Cotton Co.*, L. R. 7 Exch. 130. Certain of these statutes provide that the employe shall not assume the risk of the violation of them,—Rev. Laws Mass. c. 111, § 209 (Acts 1895, c. 362, § 7) (safety appliances on engines and cars); 27 St. U. S. p. 531, c. 196 (furnishing grab irons, etc.). See *Cleveland, C., C. & St. L. Ry. Co. v. Baker* (C. C. A.) 91 Fed. 224; *Buckner v. Richmond & D. R. Co.*, 72 Miss. 873.

²³⁸ *Supra*, §§ 2, 56.

but, where that provision is omitted, the courts have considered that, inasmuch as the plaintiff is by the act placed in no better position than a person invited to the premises of the employer, the defense of contributory negligence is left untouched, and remains as at common law.²³⁹

Some doubt was at first occasioned by the insertion in the act of the provision that the plaintiff could recover in no case where "the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence."²⁴⁰

²³⁹ Rev. Laws Mass. c. 106, § 71 (Acts 1887, c. 270, § 1); Sess. Laws Colo. 1893, c. 77, § 1 (Mills' Ann. St. 1891-96, § 1511a); Burns' Rev. St. Ind. 1901, § 7083 (Acts Ind. 1893, c. 130, § 1); *Stuart v. Evans*, 31 Wkly. Rep. 706; *Weblin v. Ballard*, 17 Q. B. Div. 122; *Perigo v. Indianapolis Brewing Co.*, 21 Ind. App. 338; *Pittsburgh, C. & St. L. Ry. Co. v. Moore*, 152 Ind. 345; *Ryalls v. Mechanics' Mills*, 150 Mass. 190.

²⁴⁰ 43 & 44 Vict. c. 42, § 2, subsec. 3.

Civ. Code Ala. 1896, § 1749 (2590): "But the master or employer is not liable under this section if the servant or employe knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that the master or employer or such superior already knew of such defect or negligence."

Rev. Laws Mass. c. 106, § 77 (Acts 1887, c. 270, § 5): "An employe or his legal representatives shall not be entitled, under the provisions of sections 71 to 74, inclusive, to any right of action for damages against his employer if such employe knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the

It was agreed that this provision did not take from the employer the defense of contributory negligence;²⁴¹ but it was said that "the defense of common employment, and also the defense that the servant had contracted to take upon himself the known risks attending upon the engagement, are taken away from him when

employer, or to some person superior to himself in the service of the employer, who was intrusted with general superintendence."

Mills' Ann. St. 1891-96, § 1511d (Sess. Laws Colo. 1893, c. 77, § 4): "An employe, or those entitled by law to sue and recover, under the provisions of this act, shall not be entitled under this act to any right of compensation or remedy against his employer in any case where such employe knew of the defect or negligence which caused the injury, and failed within a reasonable time to give or cause to be given information thereof to the employer, or to some person superior to himself in the service of his employer who had intrusted to him some general superintendence."

Acts Ind. 1893, c. 130, § 2 (Burns' St. 1901, § 7084): "Neither an employe nor his legal representatives shall be entitled under this act to any right of compensation or remedy against the corporation in any case where the injury results from obedience to any order which subjects the employe to palpable danger, nor where the injury was caused by the incompetency of the coemploye, and such incompetency was known to the employe injured, or such injured employe, in the exercise of reasonable care, might have discovered such incompetency, unless the employe so injured gave or caused to be given information thereof to the corporation, or to some superior intrusted with the general superintendence of such coemploye, and such corporation failed or refused to discharge such incompetent employe within a reasonable time, or failed or refused within a reasonable time to investigate the alleged incompetency of the coemploye or superior, and discharge him if found incompetent." Acts Ind. 1895, c. 64, § 1, repealed the provision above quoted. It was held that this repeal did not show an intention of the legislature to change the construction of the act hitherto adopted, so as to do away with assumed risks. *Whitcomb v. Standard Oil Co.*, 153 Ind. 513.

²⁴¹ *Stuart v. Evans*, 31 Wkly. Rep. 706; *Weblin v. Ballard*, 17 Q. B. Div. 122; *Birmingham Ry. & E. Co. v. Allen*, 99 Ala. 359, 374. (606)

sued by a workman under the act. * * * The legislature, while taking from the employer the two defenses above mentioned, has given him a statutory defense under section 2, subsec. 3, which theretofore did not exist. It is this: The employer, when sued for a defect in the ways, plant, or machinery, may set up that the servant knew of the defect, and did not communicate it to him, the employer, or to some other person superior to himself in the service of the employer. This, if proved, would avail the employer as a defense, and the only excuse which the workman would have for not communicating the known defect would be to establish that he was aware the employer knew of it. The legislature has thus taken from the employer two defenses, and given him another."²⁴²

The courts were agreed that this provision did not give a cause of action, but that it was passed to prevent the workman from recovering damages from his employer where he had omitted to give the information which would have enabled the latter to remove the defect, and thereby limit the effect to be given to the preceding clauses of the act.²⁴³ But the doubt was whether this was its sole effect, or whether it had also the effect of taking away the defense of assumption of risk, as it appears in the assumption of dangers existing at the time of the employment and the voluntary acceptance of risks subsequently arising. As will be seen from the quotation above given, the first impression

²⁴² *Weblin v. Ballard*, 17 Q. B. Div. 122, 125.

²⁴³ *Stuart v. Evans*, 31 Wkly. Rep. 706; *Weblin v. Ballard*, 17 Q. B. Div. 122; *Thomas v. Quartermaine*, 18 Q. B. Div. 685; *Ryalls v. Mechanics' Mills*, 150 Mass. 190; *Connolly v. City of Waltham*, 156 Mass. 368; *Birmingham Ry. & E. Co. v. Allen*, 99 Ala. 359, 374.

was that this section deprived the master of the defense of assumption of risk by a servant, and left him only the statutory answer; and this idea gained some foothold.²⁴⁴ The question was, however, set at rest by the holding of Bowen, L. J., in *Thomas v. Quartermaine*.²⁴⁵

In that case it was said: "An extension of the plain language of section 1 has been sought in the argument addressed to us to be extracted from the expressions in the third clause of section 2, which appear to assume that, but for the controlling limitations of the latter section, the master, under section 1, would have been left liable to be sued for some defects in his works of which the workman and he had both of them a knowledge. This, it was argued, indicates that the first section of the act was intended to stretch the liability of the master for defects on his premises beyond what would have been his liability to persons other than his own servants. To this objection there are three answers: The first, that clause 3 of section 2 is part of a provision that purports to limit an employer's liability, not to extend it; and it would be strange, except in a case of necessity, to evolve out of the language of a clause that limits liability a reason for extending the clear words of a previous section, in which that liability has been defined. The second answer is that clause 1 of section 2 has already in the plainest language provided that the master is not to be liable unless for defects that arise through or have remained undiscovered or unremedied owing to the negligence

²⁴⁴ *Esher, M. R.*, in *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 688; *Mobile & B. Ry. Co. v. Holborn*, 84 Ala. 133; *Highland Ave. & B. R. Co. v. Walters*, 91 Ala. 435.

²⁴⁵ 18 Q. B. Div. 685.

of the employer or his other servants; or, in other words, that there must have been a breach of duty before any action will lie. The third answer is that in the case of the outside world there are, and always have been, defects caused by negligence in a master's premises for which the master would be liable, even when both he and his visitors knew of them. Defects caused by the neglect of some statutory provision, to the benefit of which the person using the premises is entitled, and defects, lastly, caused by the negligence either of master or servant, of which the injured person had not really taken on himself the risk, are examples to which clause 3 would at law apply; and there is no necessity to travel into the region of indefinite conjecture, and to imagine freshly created duties of an employer, to account for the language of the clause." Then, after showing that a servant under the act is in the position of an invited person, and that such a person might assume the risk, though himself in due care, of dangers on the premises which he knew and voluntarily encountered, he says: "The employers' liability act of 1880 * * * renders it important to remember that quite apart from the relation of master and servant, and independent altogether of it, one man cannot sue another in respect of a danger or risk, not unlawful in itself, that was visible, apparent, and voluntarily encountered by the injured person. * * * If the decision, however, really conflicts—and I am not sure that it may not in fact conflict—with the view of the law which I have expressed, I think *Weblin v. Ballard* (17 Q. B. Div. 122) ought to be overruled."²⁴⁶

²⁴⁶ *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 693, 699. See *Esher, M. R.*, in *Yarmouth v. France*, 19 Q. B. Div. 647, 654, 656.

In Alabama it was said: "The reasoning of Bowen, L. J., on this point [extension of liability], in the case of *Thomas v. Quartermaine*, 18 Q. B. Div. 685, is convincing. It would seem that the legislature, by a statutory enactment, recognized the application of the maxim of '*Volenti non fit injuria*,' as declared by the courts, and out of abundant caution, lest the statute might be construed to give a cause of action absolutely when the defects or negligence was voluntarily and knowingly assumed by the employe, added the proviso above referred to. The Case of *Holborn*, 84 Ala. 133, was materially modified by the subsequent case of *Highland Ave. & Belt R. Co. v. Walters*, 91 Ala. 435. But we are of opinion that the proper construction of the act leaves in force the rule which prevailed before the adoption of the act, and the rule as declared by this court in the case of *Eureka Co. v. Bass*, 81 Ala. 200, and of *Louisville & N. R. Co. v. Hall*, 87 Ala. 717, 720, continues in force under the employers' act. So far as the *Holborn Case* and the *Walters Case* conflict with these conclusions, they are overruled."²⁴⁷

The same result was reached in Massachusetts: "The statute does not attempt to take away the right of the parties to make such contracts as they choose, which will establish their respective rights and duties. * * * It would be an unwarranted construction of the statute, which would tend to defeat its object, to hold that laborers are no longer permitted to contract to take the risk of working where there are peculiar dangers from the arrangement of the place and from the kind or quality of the machinery used. Nothing but the

²⁴⁷ *Birmingham Ry. & E. Co. v. Allen*, 99 Ala. 359, 374.

plainest expression of intention on the part of the legislature would warrant giving the statute such an interpretation. We have no doubt that one may expressly contract to take the obvious risks of danger from inferior or defective machinery, as well since the enactment of the statute as before. If he does so, his employer owes him no duty in respect to such risks, and if he is hurt from a cause included in the contract, the defect is not within the terms of the statute. The maxim, *Volenti non fit injuria*, applies, and he cannot recover. * * * The same reason applies equally where the employe, without any express stipulation in regard to risks, enters a service which by reason of the obvious condition of the ways, works, and machinery involves peculiar dangers. Such a contract is implied as ought to be implied from the situation and dealings of the parties, and it has the same effect as if expressly made."²⁴⁸

The act, then, has not changed the principles upon which the doctrine of assumption of risks by a servant rests, and on this point cases decided at common law are authorities upon cases arising under the act.²⁴⁹

Dangers incidental to the business or open and apparent when the employment is accepted are assumed by the servant,²⁵⁰ and dangers which subsequently arise

²⁴⁸ O'Maley v. South Boston Gas Light Co., 158 Mass. 135, 137.

²⁴⁹ Cassady v. Boston & A. R. Co., 164 Mass. 168, 170; Ryalls v. Mechanics' Mills, 150 Mass. 190; Lake Shore & M. S. Ry. Co. v. Malcolm, 12 Ind. App. 612; Whitcomb v. Standard Oil Co., 153 Ind. 513.

²⁵⁰ Thomas v. Quartermaine, 18 Q. B. Div. 685; Walsh v. Whiteley, 21 Q. B. Div. 371; O'Maley v. South Boston Gas Light Co., 158 Mass. 135; Fisk v. Fitchburg R. Co., 158 Mass. 238; Goodes v.

will not permit a recovery under the act if the servant is brought within the principle of *volenti non fit injuria*.²⁵¹ In neither of these matters has the act wrought any change.

The provision creates a statutory defense.

The sole effect of this clause of the act is, then, to give the employer a defense that the employe, knowing of the injury, failed to inform the employer of it. In Massachusetts it is held that the section "was not intended to create conditions precedent which a plaintiff must show to have been complied with before he can maintain an action, but to give to the employer a new ground of defense, the burden of showing which rests upon the defendant. The fifth section is not a part of the provisions which define the circumstances essential to show that a plaintiff comes within the right of recovery granted in the first section of the statute; nor is it a requirement that something shall at all events be done before the right of action accrues, such as giving due notice of the injury, but it excepts from the right to recover employes who, knowing the danger, fail to give information thereof within a reasonable time. As this exception is not in that portion of the statute which gives the right of action, and as the fail-

Boston & A. R. Co., 162 Mass. 287; Highland Ave. & B. R. Co. v. Walters, 91 Ala. 435; Mobile & O. R. Co. v. George, 94 Ala. 199.

²⁵¹ Yarmouth v. France, 19 Q. B. Div. 647; Smith v. Baker [1891] App. Cas. 325; Fraser v. Hood, 15 Rettie, Ct. Sess. Cas. (4th Ser.) 178; Mellor v. Merchants' Mfg. Co., 150 Mass. 362, 364; O'Maley v. South Boston Gas Light Co., 158 Mass. 135, 139. See dictum in Boyle v. New York & N. E. R. Co., 151 Mass. 102, 103; Birmingham Ry. & E. Co. v. Allen, 99 Ala. 359; Bridges v. Tennessee C., I. & R. Co., 109 Ala. 287.

ure to give information does not prevent recovery unless the employe knows of the defect or negligence so long a time before his injury that he can reasonably give information, and with such knowledge fails to give the information, it is a matter of defense only, and need not be alleged or proved by the plaintiff."²⁵²

This is a defense to such negligence, only, as would give a cause of action to the servant under some one of the clauses of the act. Possibly it does not apply to an injury caused by a defect in the rules and by-laws, or in obedience to particular instructions. The words, it is to be noted, are "defect or negligence." There have been no decisions construing the terms of the section.

The servant must "know" of the defect or negligence, but in default of actual knowledge it would probably be sufficient if the facts were such that the servant must have known unless he had carelessly shut his eyes to the danger. Having the knowledge, information must be given "within a reasonable time"; and this also must mean that there must be opportunity between the acquisition of knowledge and the injury in which notice can be given. What is a "reasonable time" would ordinarily be a question for the jury.

The servant must get this information to the employer or to some one superior to himself in the service. The words "give, or cause to be given," imply that he must intend that the information shall reach the proper person for the purpose of remedying the defect or neg-

²⁵² Connolly v. City of Waltham, 156 Mass. 368, 371; Weblin v. Ballard, 17 Q. B. Div. 122; Thomas v. Quartermaine, 18 Q. B. Div. 685; Broslyn v. Kansas City, M. & B. R. Co., 114 Ala. 398.

ligence.²⁵³ Merely talking of the danger, without seeing that the employer hears of it, would not come within the meaning of the section.

The information, moreover, must be such as will enable the employer to discover and remedy the defect or negligence, and must be definite enough to attain this end. It is hardly to be expected, however, that a servant should give technical or exact information of the defect, nor, on the other hand, would a general notice be enough.

If information is not given the employer, it must be given "to some person superior to himself in the service." The person specified need not be a person for whose negligence the master is made responsible by the act, though it would seem reasonable to hold that he was such a one as had some duties in the premises, and that superior rank merely is not enough. Massachusetts and Colorado require that the person shall be "one who had intrusted to him some general superintendence," that is, one with power enough to see that the defect or negligence is remedied.

The servant is excused from giving information, in England and Alabama, if he "was aware that the employer or such superior already knew of the said defect or negligence." Where both plaintiff and defendant knew, the defense is inapplicable. Knowledge by the master is probably that which he ought, in the exercise of reasonable care, to possess, and need not be actual knowledge, though, as that is substantially the allegation which the servant must prove in the first place to establish his case, it may be that actual knowledge

²⁵³ Thomas v. Bellamy, 126 Ala. 253.

would be required on the master's part in order to make this defense effectual. The servant is not excused unless he was aware of the defendant's knowledge.²⁵⁴

§ 118. Court or jury.

The jury applies to the facts the definitions or rules of law laid down by the court. These definitions and rules are applied to the facts by the court only when there is no conflict of evidence, or reasonable men would draw the same conclusion from the evidence.

The knowledge and conduct of the plaintiff, when not in dispute, may be passed upon by the court to determine whether the master owed him any duty, or whether the plaintiff has disabled himself from recovering for the nonperformance of the master's duty.

The respective spheres of judge and jury have been thus defined: "The whole proceeding assumes the form of a syllogism, of which the law is the major proposition, the fact is the minor, and the judgment the conclusion. * * * The judge directs the jury in all matters of law, at each step of the trial, as questions arise, and ultimately in its application to the facts of the case, if proved by the evidence submitted to them. As the judge cannot foresee how the jury will find the facts, until they have retired to consider of their verdict, these directions are of necessity hypothetical. If they find certain facts proved, he directs them that the law affixes to them a certain character, and so upon each material point of law, and then, if they find so, the accused is guilty; if otherwise, not guilty; and that they are to return their verdict accordingly."²⁵⁵ The

²⁵⁴ See *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143.

²⁵⁵ *Com. v. Anthes*, 5 Gray (Mass.) 185, 189, 200.

determination of the rule of law is the peculiar province of the court, but it is capable of deciding, and in many instances does absolutely decide, pure questions of fact; and this has led to the statement that a "jury has to do with only a limited class of questions of fact, namely, questions of ultimate fact."²⁵⁶

In master and servant cases the cause of action is negligence, and requires a statement of the duty existing between the parties which is essentially a question of law, and a finding of fact upon the issue whether there was a violation of duty proximately causing the injury.²⁵⁷ This finding of fact is primarily to be made by the jury, but the court is bound always to examine the evidence, and determine whether from it negligence may reasonably be inferred. If different conclusions

²⁵⁶ J. B. Thayer, "Law and Fact in Jury Trials," 4 Harv. Law Rev. 147, 149.

²⁵⁷ "The law determines the duty; the evidence shows whether the duty was performed. What duty rested upon the defendant was a question of law; was that duty properly performed was a question of fact. If the court required of the defendant some act which the law did not require, it erred in a matter of law, and the question may be reviewed by this court. If the court simply found that the defendant failed to do some required act, that is a finding of fact, and cannot be reviewed. The main question here is a question of duty, and not a question of performance, and is therefore a question of law." *Nolan v. New York, N. H. & H. R. Co.*, 53 Conn. 461, 471; *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 474 (proximate cause); *Sutton v. New York Cent. & H. R. R. Co.*, 66 N. Y. 243; *Jaggard*, Torts, 931 et seq.; *Shearman & Redfield*, Neg. (5th Ed.) §§ 52-56. "When the facts are agreed upon, or otherwise appear, what is ordinary care is a question for the court. When the facts are in dispute, the proper course for the judge is to explain what would be ordinary care under certain hypotheses as to facts, and have the jury to apply the law to the facts as they find them." *Wallace v. Western N. C. R. Co.*, 98 N. C. 494.

might properly be reached, the jury is to decide the issue.²⁵⁸ But in questions of negligence the issues of duty and violation so often depend upon inferences or conclusions from conflicting facts that the court ordinarily is able only to state the rule of law, and leave the jury to say whether on the facts as found by them there has been either a duty or a violation.²⁵⁹

The construction of the several subdivisions of the act is a question of law to be determined by the court, and, having laid down the rule, it examines the evidence to see whether the facts, in the light most favorable for the plaintiff, come within that definition. In deciding whether a given person was a "superintendent," or whether there was a "defect," the court does not consider the plaintiff or his conduct, but looks at the question from the defendant's standpoint. When, however, a ruling that the plaintiff assumed the risk or was guilty of negligence is requested, the court looks only at his conduct, and, in cases of contractual assumption of risk, a finding that the plaintiff assumed the risk is equivalent to a finding that the defendant owed no duty. In such cases it is immaterial whether the question is approached from the plaintiff's or the defendant's standpoint.²⁶⁰ But this is not the case where the plaintiff's recovery is barred by either contributory negligence or consent to the defendant's breach of duty. And a decision against a plaintiff by the court is not, as in the former case, a construction of the duty existing between them, but is an affirmative finding of fact, to be

²⁵⁸ See *supra*, § 54, and cases cited.

²⁵⁹ *McCully v. Clarke*, 40 Pa. 399, 406.

²⁶⁰ *Supra*, § 88.

justified only where, as in other cases of fact, a jury could not reasonably come to a contrary conclusion.²⁶¹ The loose use of the phrase "assumption of risk" to cover not only disabilities imposed by the policy of the law upon those who become servants, but also defenses not peculiar to master and servant law, as *volenti non fit injuria* and contributory negligence, has led the courts to decide matters of fact that are properly questions for the jury.²⁶²

The preceding sections have necessarily considered the right of the court to direct a verdict for the defendant in specific instances, and it remains only to restate the main principles upon which it proceeds.

Contractual assumption of risk.

The master owes no duty to the servant as to the disabilities imposed by the law upon the latter when the relation is created, and, if the court finds that the injury arose from one of these disabilities, it follows that the master is not guilty of negligence, and cannot be charged with liability. The doctrine of contractual assumption of risk, which includes the master's exemption from responsibility for the negligence of fellow servants, for injuries arising through dangers incidental to the business, and for injuries arising from the

²⁶¹ See Knowlton, J., dissenting, *Davis v. Forbes*, 171 Mass. 548; supra, § 114.

²⁶² Supra, § 82. That the distinction is often immaterial adds to the confusion. "Whether it be said that the plaintiff took the risk, or that he was negligent, or that the defendant's negligence was not the proximate cause of the injury, the result must be that the plaintiff cannot recover." *Keenan v. Edison Electric Illuminating Co.*, 159 Mass. 379.

existing condition of affairs, measures the defendant's duty to the plaintiff, and does not concern his care in performing it. Thus it is primarily to be determined by the court on the facts appearing in evidence, and the jury decide it only when the facts are conflicting.²⁶³

An employer is not liable for the negligence of competent fellow servants not charged with the performance of his personal duties,²⁶⁴ and the court is obliged to lay down the definition of fellow servants, and of the servants specified in the act, and state under what circumstances the master will be liable for their negligence. Having given the rule, if the evidence, viewed in the light most favorable for the plaintiff, fails to come within a definition imposing liability, the court must rule that there can be no recovery. "Moore was employed by the defendant to do certain things upon the lighter. Whether, in doing them, he was a servant engaged with others upon the lighter in a common employment, or was a deputy master or vice principal, was a question of law, and not of fact. What he was employed to do was a question of fact; the capacity in which he did it was an inference of law. Had there been any question as to the facts, they should have been left to the jury, with instructions as to the legal inferences to be drawn from the facts which should be found. As the facts were not disputed, the question left to the jury was one of pure law. If the jury had found the law correctly, this error might have been cured; but it cannot appear that the verdict may not have been formed upon an incorrect answer to this ques-

²⁶³ *Supra*, § 88.

²⁶⁴ *Supra*, § 89. See, also, *supra*, §§ 53, 55, 57-62, 65, 74.

tion. We think the court should have ruled, in accordance with the prayer of the defendant, that Moore and the plaintiff were fellow servants.²⁶⁵

Where the injury arises from a risk which is alleged to be incidental to the employment, the same rule is applied; and if the court can, from its own knowledge²⁶⁶ of the nature or conduct of the business, find the fact that the risk was incidental, it directs a verdict. If, however, the risk is not, as a matter of common knowledge, incidental to the business, it depends upon conflicting evidence, and the question must be submitted to the jury under proper instructions.²⁶⁷

The third disability is one imposed alike upon servants and invited persons, and the rule of law which must be applied to the facts is that if the plaintiff knows and appreciates the dangers arising from the condition of the premises, or if the danger is of such a character that in the exercise of reasonable care he would know and appreciate it, and he accepts employment, he cannot hold his master liable for a resulting injury.²⁶⁸ The application of the rule of law, whether by the court or by the jury, involves a finding upon several matters of fact. The knowledge, capacity, and experience of the plaintiff, the character of the danger, the care necessary to discover it, and the fact of his

²⁶⁵ *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209, 210; *McGinty v. Athol Reservoir Co.*, 155 Mass. 183; *Union Steamship Co. v. Claridge* [1894] App. Cas. 185; *Northern Pac. Coal Co. v. Richmond (C. C. A.)* 58 Fed. 756; *Alaska Treadwell Gold Min. Co. v. Whelan (C. C. A.)* 64 Fed. 462.

²⁶⁶ *Infra*, § 119.

²⁶⁷ *Supra*, §§ 90, 91.

²⁶⁸ *Supra*, § 92. Duty to warn, see *supra*, § 99.

accepting employment are all in issue. As in the other cases, if any one of these issues depends upon a conflict of evidence or of inferences to be drawn from the facts, the court permits the jury to apply the rule, and determine whether or not a duty exists and if it has been unfulfilled.

When it appears that the plaintiff knew the danger, the most difficult issue is eliminated, and the court may find that no duty was owed him.²⁶⁹ But in the majority of cases the court must determine whether the plaintiff ought to have known the danger. Where the plaintiff is an adult, the court assumes that he knows the facts of common experience. Whatever knowledge he may possess beyond this is a matter of proof. His experience in this or other work and his previous training are introduced to show what he ought to know.²⁷⁰ On the other hand, it may appear not only that he was lacking in previous experience, but that he was more ignorant or less intelligent than the average person.²⁷¹ If the plaintiff is a minor, he is assumed to possess the knowledge and capacity of persons of his age, and it is likewise open to either side to show greater or less knowledge and experience and intelligence.²⁷² These facts may appear not only by oral evidence, but from the appearance of the plaintiff in court and his conduct.²⁷³

²⁶⁹ *Supra*, § 93.

²⁷⁰ *Supra*, § 98.

²⁷¹ *Supra*, §§ 98, 99. Obvious dangers, see *supra*, § 95.

²⁷² *Supra*, §§ 96, 98, 99.

²⁷³ *Keith v. New Haven & N. Co.*, 140 Mass. 175; *Peaslee v. Fitchburg R. Co.*, 152 Mass. 155. As to the effect on appeal of a ruling based on such evidence, see *Stephenson v. State*, 28 Ind. 272 (Judge

Having discovered the amount of knowledge, experience, and intelligence the plaintiff possessed, the next question is whether it would have enabled him to discover the danger, and this involves an inquiry into the condition of affairs. The danger may be hidden or latent, not to be discovered by any reasonable inspection, and therefore impossible to be known to the plaintiff;²⁷⁴ or it may be open and apparent, forcing itself on his attention or capable of discovery, as an elevator opening or revolving rollers; or it may be a danger that only one of experience would look for, as the character of soil which might cause a trench to cave, or the liability of molten metal to explode when it touches water.²⁷⁵ Whatever the character of the danger, the court must, in the first instance, determine whether a person possessed of this plaintiff's experience would have known it, provided he exercised that degree of care to be expected of one engaging in an employment of a possibly dangerous character; and the care he must exercise is that of a person of his capacity and intelligence.²⁷⁶ He is not obliged to search for dangers or to make unreasonable inspection, but he is obliged to notice whatever he could see if he looked.²⁷⁷ The plain-

found boy over ten); *Tully v. Fitchburg R. Co.*, 134 Mass. 499 (view by jury; new trial).

²⁷⁴ *Supra*, § 95. As where under side of floor was rotten, *Hudleston v. Lowell Mach. Shop*, 106 Mass. 282.

²⁷⁵ *Supra*, §§ 95, 96.

²⁷⁶ *Supra*, §§ 94-96. Whether he would have ascertained the danger "by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage." *Rooney v. Sewall & D. Cordage Co.*, 161 Mass. 153.

²⁷⁷ *Supra*, § 95, note 201.

tiff is entitled to every inference in his favor, and it is only where the court can say that he was negligent in not drawing upon his fund of knowledge, and thereby discovering the dangers that would be obvious to him, that he is held to assume them. If he ought to have known it, his statement that he did not merely declares his negligence.²⁷⁸

Knowledge of the danger may not always be sufficient, for it may appear that the plaintiff did not appreciate the risk of injury to him from it; but this inquiry is to be determined by the same principles.²⁷⁹

The last question of fact is his acceptance of the employment, and this is never in dispute. The court may infer from it a willingness to undertake the risks which it finds that he knew and appreciated. No other inference is possible, for he was free to accept or reject the offer of employment, and his act of acceptance was not under constraint, and was not a yielding of a right.

If any of these issues depend upon a conflict of fact or of inferences, the court must submit the question to the jury under proper instructions.

Volenti non fit injuria.

Where there has been an alleged breach of duty on the part of the master, he may nevertheless escape responsibility if it appears that the plaintiff waived or consented to the breach, and agreed to take upon his own shoulders the risk of injury. This inquiry must necessarily be decided from the plaintiff's conduct; and the rule as to the power of the court in this, as in other

²⁷⁸ Supra, § 95.

²⁷⁹ Supra, § 97.

cases, to decide the fact, is that a contrary inference from the undisputed facts cannot reasonably be drawn.²⁸⁰

Before he can consent to the breach, he must know and appreciate the risk, and, if he does not in fact know, the danger must be such as due care on his part would have disclosed to him. The measure of his care is somewhat different in discovering these subsequent risks from the care which he is bound to exercise when he first enters the employment. He may properly rely upon the master's care in performing his obligations,²⁸¹ and trust to the assurances of his superiors,²⁸² save when the breach and danger are such that common care would disclose the risk to him, or the nature of his work requires him to notice it.²⁸³

It has been pointed out that the fact of his continuing at work with such knowledge and appreciation of the risk presents in itself a distinct issue, and, though the fact of remaining at work is not disputed, the inferences reasonably to be drawn from it are not in every case the same.²⁸⁴ In this respect it differs from the act of accepting the employment in the first place, from which but one inference is possible. The necessary element of consent must be found in these inferences, and, although the character of the danger may strengthen or weaken the inference of consent, it is at best but one of several constructions to be placed upon an admitted fact, and therefore the jury is the proper

²⁸⁰ Supra, § 114. As to *volenti non fit injuria*, see supra, § 85.

²⁸¹ Supra, § 111.

²⁸² Supra, § 113.

²⁸³ Supra, § 112.

²⁸⁴ See supra, § 114.

tribunal to decide the issue. This is the theory now established in England; but the tendency of the state courts is to hold that but one inference can properly be drawn from the fact of remaining at work, and that is consent to the breach, where it appears that the plaintiff thoroughly appreciated the danger. It is here that the courts seem to have trespassed upon the province of the jury.²⁸⁵ If, however, other facts appear,—that the plaintiff complained and repairs were promised,²⁸⁶ or possibly if he remained and undertook the risk through fear of discharge,²⁸⁷—the inference of consent is rebutted.

The act of remaining in face of danger may be grossly negligent, and the plaintiff properly barred on that ground; but, when that is not the case, it seems that the nonliability of the master should rest upon the maxim, and not, as is sometimes stated, in all cases, upon contributory negligence.²⁸⁸

Contributory negligence.

“Questions of negligence, as well as of contributory negligence, are generally within the province of the

²⁸⁵ *Davis v. Forbes*, 171 Mass. 548, Knowlton, J., dissenting; *supra*, § 114b.

²⁸⁶ *Supra*, § 115.

²⁸⁷ *Supra*, § 107.

²⁸⁸ *Supra*, § 114. As to the distinction between the defenses, see *supra*, § 86. When the existence of the defect is left to the jury, the question of the plaintiff's assumption of risk should also be submitted. *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202. If the defendant says the repeating of a machine is impossible, then the plaintiff did not take the risk of it, and the conflict of evidence must be left to the jury. *Packer v. Thomson-Houston Electric Co.*, 175 Mass. 496.

jury, which should not be invaded by the courts except in the clearest of cases. Unless there was a clear absence of evidence tending to show that the negligence of the defendant was the proximate cause of the injury, or unless it was clearly established by the evidence that the negligence of the plaintiff contributed to cause the injury, the verdict of the jury, having been given in the plaintiff's favor, cannot properly be disturbed on either of those grounds."²⁸⁹ When, therefore, there is a conflict of evidence, or, the facts being established, different inferences may reasonably be drawn from them, the jury must decide the question of the plaintiff's due care.

It is generally impossible for a plaintiff to lay his case before the jury without offering evidence tending to show or rebut his contributory negligence;²⁹⁰ but, where there is an entire absence of evidence upon the issue, the power of the court to direct a verdict against the plaintiff rests upon the manner in which the issue is presented to it. It was previously noted²⁹¹ that although in all jurisdictions the final burden of establishing his case rests on the plaintiff, yet the courts are not in accord upon the question whether contributory negligence should be pleaded and proved as a part of the right of action or as a matter of defense. England,

²⁸⁹ *Colorado M. Ry. Co. v. O'Brien*, 16 Colo. 219, 226; *Hackett v. Middlesex Mfg. Co.*, 101 Mass. 101; *Southern Ry. Co. v. Shields*, 121 Ala. 460.

²⁹⁰ *Wakelin v. London & S. W. Ry. Co.*, 12 App. Cas. 41.

²⁹¹ *Supra*, § 84. When rule as to due care grows out of statute, it is binding on federal courts. *Byrne v. Kansas City, Ft. S. & M. R. Co.* (C. C. A.) 61 Fed. 605; *Overman Wheel Co. v. Griffin* (C. C. A.) 67 Fed. 659.

Alabama, Indiana, Colorado, and the federal courts hold that the issue must be raised by the defendant, and if he fails in the first instance to offer evidence of contributory negligence, unless negligence appears from the plaintiff's statement, the court cannot direct a verdict against the plaintiff on that ground.²⁹² On the other hand, Massachusetts holds that the plaintiff must in the first instance offer evidence of his due care, and, if he fails to do so, he cannot recover. Thus, where it is left to conjecture whether or not the accident happened through the plaintiff's negligence, a verdict will be directed for the defendant.²⁹³ But due care may be inferred from the absence of negligence as well as from positive acts of diligence.²⁹⁴ Thus, when all the circumstances are in evidence, and it appears that the plaintiff was killed while in the performance of his

²⁹² *Bromley v. Birmingham M. R. Co.*, 95 Ala. 397. See, also, *supra*, § 84; *infra*, § 127.

²⁹³ *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257 (attempting to cross track); *Corcoran v. Boston & A. R. Co.*, 133 Mass. 507 (fall from car); *Riley v. Connecticut River R. Co.*, 135 Mass. 292 (struck by bridge); *Blanchette v. Border City Mfg. Co.*, 143 Mass. 21 (steam and starch blown on plaintiff); *Tyndale v. Old Colony R. Co.*, 156 Mass. 503 (struck on track); *Shea v. Boston & M. R. R.*, 154 Mass. 31 (run over on track); *Barton v. Kirk*, 157 Mass. 303 (fall from ladder); *Irwin v. Alley*, 158 Mass. 249 (caught on shaft); *Chandler v. New York, N. H. & H. R. Co.*, 159 Mass. 589 (fall from car); *Geyette v. Fitchburg R. Co.*, 162 Mass. 549 (train broke apart, and deceased, going back to investigate, probably fell off car); *McLean v. Chemical Paper Co.*, 165 Mass. 5 (falling to give warning, and scalded by steam); *Murphy v. Boston & A. R. Co.*, 167 Mass. 64 (struck by bridge); *Dacey v. New York, N. H. & H. R. Co.*, 168 Mass. 479 (mounting car); *Dyer v. Fitchburg R. Co.*, 170 Mass. 148 (run over on track).

²⁹⁴ *Caron v. Boston & A. R. Co.*, 164 Mass. 523 (going along train to make coupling).

duty, his due care may be inferred.²⁹⁵ The burden rests upon the plaintiff to show due care. "Although, in form, a proposition to be established affirmatively, it is not necessarily to be proved by affirmative testimony addressed directly to its support. The burden is held to be upon the plaintiff, for the reason that it is a subordinate proposition, necessarily involved in the more general one upon which the action is founded, to wit, that the injury to the plaintiff was caused by the negligent or wrongful conduct. If this be shown by evidence which excludes fault on the part of the plaintiff, the proposition of due care is established as effectually as if by affirmative testimony. All the circumstances under which the injury was received being proved, if they show nothing in the conduct of the plaintiff, either of acts or neglect, to which the injury may be attributed in whole or in part, the inference of due care may be drawn from the absence of all appearance of fault. * * * Where one voluntarily puts himself in a place of exposure to injury, without some reason of necessity or propriety to justify him in so doing, and injury happens to him in consequence of his being in that place, he is not allowed to recover for such injury, although he may be able to show negligence in the conduct of the other party."²⁹⁶

When the fact of continuance in service with knowl-

²⁹⁵ *Maguire v. Fitchburg R. Co.*, 146 Mass. 379 (duty to sweep grain off track, and found dead with his broom); *Thyng v. Fitchburg R. Co.*, 156 Mass. 13 (thrown to ground, while doing his duty, by breaking apart of train); *Maher v. Boston & A. R. Co.*, 158 Mass. 36 (duty to watch rear of train, and struck by bridge); *Mears v. Boston & M. R. R.*, 163 Mass. 151 (struck by kicked off car while engaged in inspecting cars).

²⁹⁶ *Mayo v. Boston & M. R. R.*, 104 Mass. 137, 140.

edge of danger is relied on to defeat recovery, it would seem that the power of the court to decide whether such conduct was in the exercise of due care should rest upon the same principles.²⁹⁷

§ 119. Judicial notice.

The court will, without proof, take judicial notice of facts of common experience.

The court may take cognizance of many matters material to the case, and treat them as established without allegation or proof. "Courts may and should notice without proof, and assume as known by others, whatever, as the phrase is, everybody knows. * * * It is assumed that they all know certain conspicuous and generally known facts, and are capable of making certain obvious applications of their knowledge."²⁹⁸ This doctrine of judicial notice has been greatly extended in the consideration of assumed risks, both in determining what risks are incidental to the business, and in deciding whether the plaintiff had the requisite knowledge to appreciate the dangers arising from the action of the material or machinery upon which he worked. It is a power "to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative."²⁹⁹

"There are some matters connected with the running and operation of trains of which courts will take judicial

²⁹⁷ *Supra*, § 114.

²⁹⁸ J. B. Thayer, "Judicial Notice and the Law of Evidence," 3 *Harv. Law Rev.* 285, 305; *Brown v. Piper*, 91 U. S. 37; *State v. Downs*, 148 Ind. 324; *supra*, §§ 90, 95.

²⁹⁹ *Brown v. Piper*, 91 U. S. 37, 43.

notice, such as the place of the engineer and fireman; but we are not aware that the footboard in front of a shifting engine is the post of duty of the yardmaster and conductor, is a matter of common knowledge and general notoriety, though it may be known to railroad officers and employes, and persons who frequent stations where such engines are employed. Courts will not take judicial notice of the rules and regulations of a railroad company."³⁰⁰ The rules and regulations of miners cannot be noticed.³⁰¹

³⁰⁰ Highland Ave. & B. R. Co. v. Walters, 91 Ala. 435, 444; Baltimore & O. S. W. Ry. Co. v. Little, 149 Ind. 167, 173 (meaning of "yard"); Atchison, T. & S. F. R. Co. v. Headland, 18 Colo. 477 (that freight and passenger trains are run separately); Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274 (that trains must run at high speed); Rice v. Montgomery, 4 Biss. 75, Fed. Cas. No. 11,753 (but not the time to pass between given points); Wiggins v. Burkhams, 10 Wall. (U. S.) 129 (but not the time to pass between given points); Pearce v. Langfit, 101 Pa. 507 (but not the time to pass between given points); Chicago, St. L. & P. R. Co. v. Champion, 9 Ind. App. 510 (cannot say a car will not jump forward when brakes are loosed); Burlington, C. R. & N. Ry. Co. v. Dey, 82 Iowa, 312 (that cars are forwarded over different lines); Moore v. Saginaw, T. & H. R. Co., 115 Mich. 103 (that jolts come in handling freight trains, but not that a train can be stopped without some jolt); Jonas v. Long Island R. Co., 21 Misc. Rep. 306, 47 N. Y. Supp. 149; Missouri Pac. Ry. Co. v. Lewis, 24 Neb. 848 (cannot notice that unblocked frogs are negligence per se); Frace v. New York, L. E. & W. R. Co., 143 N. Y. 182 (use of spark arresters).

The court will notice that the management and control of the running of trains is in the owners of the road (Evansville & C. R. Co. v. Smith, 65 Ind. 92; South & North Ala. R. Co. v. Pilgreen, 62 Ala. 305), and that subordinate officers at different points attend to the starting of trains (Slater v. Jewett, 85 N. Y. 61). It does not know the duties of a superintendent at any particular station (Southern Ry. Co. v. Hagan, 103 Ga. 564), nor of a division superintendent (Brown v. Missouri, K. & T. Ry. Co., 67 Mo. 122),

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The court will notice the explosive character of natural gas,³⁰² or the inflammable character of coal oil,³⁰³ but not that coal dust³⁰⁴ or fertilizer dust³⁰⁵ is explosive.

The court will take notice of the change and advance in the methods of conducting business,³⁰⁶ and of such well-known arts as photography.³⁰⁷

In an important case upon this subject, the plaintiff, a brakeman, testified that while sitting on top of a car his head was struck by a brick arch in a tunnel. There was a space of four feet and seven inches from

nor of brakemen on passenger trains (Cleveland, C., C. & I. Ry. Co. v. McLean, 1 Ohio Cir. Ct. R. 112). It will notice the duties of a conductor (Dye v. Railroad Co., 19 Wash. Law Rep. 369), or of a section foreman (Mobile & O. R. Co. v. Stinson, 74 Miss. 453); also that grades are laid out by the company's engineer (Alabama M. Ry. Co. v. Coskry, 92 Ala. 254). Other cases on the subject of judicial notice are to be found in sections 90, 91, 95, 96, *supra*. See, also, Griffith v. Denver Consolidated Tramway Co., 14 Colo. App. 504 (that it is carelessness to go in front of moving car); Chicago City Ry. Co. v. Smith, 54 Ill. App. 415 (the court does not know about the proper management of horses).

³⁰¹ Meydenbauer v. Stevens, 78 Fed. 787.

³⁰² Jamieson v. Indiana Natural Gas & Oil Co., 128 Ind. 555; McGahan v. Indianapolis Natural Gas Co., 140 Ind. 335. Will not notice that gas will pass through soil. Mississinewa Min. Co. v. Patton, 129 Ind. 472.

³⁰³ State v. Hayes, 78 Mo. 307.

³⁰⁴ Cherokee & Pittsburg C. & M. Co. v. Wilson, 47 Kan. 460.

³⁰⁵ O'Reilly v. Bowker Fertilizer Co., 174 Mass. 202.

³⁰⁶ Gregory v. Wendell, 39 Mich. 337, 40 Mich. 432; Wiggins Ferry Co. v. Chicago & A. R. Co., 73 Mo. 389.

³⁰⁷ Luke v. Calhoun Co., 52 Ala. 115; De Forge v. New York, N. H. & H. R. R., 178 Mass. 59 (X-ray photograph admitted); Kansas City, M. & B. R. Co. v. Smith, 90 Ala. 25; Bell v. New York, N. H. & H. R. Co., 168 Mass. 443 (photographs admissible in evidence); City of Crawfordsville v. Braden, 130 Ind. 149 (notice of the properties of electricity).

the top of the car, where plaintiff sat, to the bottom of the arch, and his head, therefore, must have been at least four feet and eight inches above the car. "There was no evidence given on the trial as to the plaintiff's size or height, and the argument is now made that as the jury saw him, and could therefore judge of his size, it must be assumed that it was not impossible for his head to have reached as high as the arch; and the learned judge who presided at the trial appears to have submitted this question to the jury, saying: 'If the plaintiff was sitting down, it is for you to say whether his head would reach to that height.' The verdict of the jury rests upon an affirmative answer to this question, and we are now called upon to say whether we will accept that finding and sustain the judgment, or whether we will take judicial notice of the height of the human body and the measurements of its separate parts, and, so taking notice of those facts, reverse a judgment that is based on a finding clearly contrary to the laws of nature. * * * We know that the average height of man is less than six feet, that the measurement varies but little in adults, and that the chief difference in the height of men is in the length of their lower limbs. To assume, therefore, as we must, in order to sustain the judgment, that the top of the plaintiff's head, when in a sitting position, was four feet seven inches above the board on which he was sitting, is to assume him to have been not only far above the average height of man, but of a height beyond that of which we have any authentic record. It has not been claimed by the respondent that the plaintiff was a man of extraordinary height, and, if he was, I think a fact

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so rare in the course of nature should be made apparent in some way on the record." The judgment was accordingly reversed.³⁰⁸

Where a fact is of such a character that the court may take judicial notice of it, the jury will also be presumed to know it. "Jurors are not to be presumed ignorant of what everybody else knows. And they are allowed to act upon matters within their general knowledge, without any testimony on those matters."³⁰⁹ So, it will happen that, if every one knows the fact, the plaintiff himself must be taken to know it, and he can neither deny his knowledge of it or offer evidence upon the subject.³¹⁰

³⁰⁸ *Hunter v. New York, O. & W. R. Co.*, 116 N. Y. 615, 620, 622.

³⁰⁹ *Commonwealth v. Peckham*, 2 Gray (Mass.) 514.

³¹⁰ *Supra*, § 95. "Also, if the matter is of such character that it is judicially known to the court, the fact is not a question for the jury." *Highland Ave. & B. R. Co. v. Walters*, 91 Ala. 435, 444.

CHAPTER X.

PLEADING AND PRACTICE.

§ 120. Material Allegations of Declaration.

121. Defect in Condition.

122. Negligence of Superintendent.

123. Negligence of Person to Whose Orders Plaintiff must Conform.

124. Negligence of Person in Charge or Control.

125. Notice.

126. Pleading Negligence.

127. Contributory Negligence.

128. Joinder of Counts.

129. Election of Counts.

130. Pleading by the Defendant.

131. Directing Verdict.

132. Fact of Insurance not Admissible.

§ 120. Material allegations of declaration.

The declaration or statement of claim must contain all the material allegations to sustain a cause of action under the act.

The act has itself in its several subdivisions prescribed the allegations necessary to be made to bring the cause of action within its terms, and these must be alleged in the declaration. In Massachusetts a declaration which merely follows the words of the statute without more is good as against a general demurrer.¹

¹ *Steffe v. Old Colony R. Co.*, 156 Mass. 262; *Caron v. Boston & A. R. Co.*, 164 Mass. 523; *United States Rolling Stock Co. v. Weir*, 96 Ala. 396. See *Louisville & N. R. Co. v. Coulton*, 86 Ala. 129; *Chambliss v. Mary Lee C. & Ry. Co.*, 104 Ala. 655; *Central of Georgia Ry. v. Lamb*, 124 Ala. 172; *Colorado Coal & Iron Co. v. Carpita*, 6 Colo. App. 248.

In other jurisdictions there are some peculiarities of statement which will be noted.

The act applies only where there is a relation of master and servant existing, and therefore it should be alleged that the plaintiff was at the time of the accident in the employ of the defendant. In Massachusetts a declaration which alleged that the "defendant was the owner of, and had the management and control of a certain vessel' on a certain day; that the plaintiff 'was then and there at work on said vessel * * * as a laborer * * * shoveling coal and discharging the cargo,' etc.; and that he 'was then and there in the employ of one White, a stevedore then doing the work of discharging the said cargo of said vessel,' " was held good. "We are of opinion that, upon a general demurrer not pointing out any specific defect, the foregoing allegations must be taken to mean that White was doing the defendant's work, and discharging the cargo in the course of business, and that he and the plaintiff were lawfully there in pursuance of an arrangement of some kind between the defendant and White. The language quoted, taken in its natural meaning, is not equally consistent with White's being a trespasser, or with the possibility that he and the plaintiff were engaged in stealing coal. We do not construe declarations quite so adversely nowadays as indictments were construed a hundred years ago."²

The complaint need not set out the place where the injury was received, although it has been intimated that

² Coughlin v. Boston Tow-Boat Co., 151 Mass. 92.

good pleading would require a statement that it happened within the jurisdiction.³

The rules of pleading the contractual assumption of risk have already been considered in a previous section.⁴

§ 121. Defect in condition.

Pleading a defect in the condition of the ways, works, and machinery.

Some defect "in the condition of the ways, works, or machinery" must be alleged. Thus, a declaration which, after narrating the manner in which the accident occurred, alleged that the "defendant corporation by its servants and agents was negligent, and was guilty of a breach of duty towards the plaintiff," does not allege any defect.⁵ When the facts showing the existence of a defect are set out, it must appear that they show a "defect," within the meaning of the term; and an allegation of a defect is not, of course, supported by proof of facts which do not, as a matter of law, constitute such a defect.⁶ Several specific defects may be alleged in one count, and when this is the case it is only necessary to prove the general averment of a defect.⁷ It is sufficient to state generally the facts, and allege that

³ *Mobile & Ohio R. Co. v. Thomas*, 42 Ala. 672; *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240.

⁴ *Supra*, § 87.

⁵ *Marnin v. Kitson Mach. Co.*, 159 Mass. 156.

⁶ *Birmingham Furnace & Mfg. Co. v. Gross*, 97 Ala. 220; *Clements v. Alabama G. S. R. Co.* (Ala.) 28 South. 643; *Southern Ry. Co. v. Moore* (Ala.) 29 South. 659; *Louisville & N. R. Co. v. Jones* (Ala.) 30 South. 586.

⁷ *Alabama Great Southern R. Co. v. Bailey*, 112 Ala. 167.

they constitute a defect in the condition of the ways, works, or machinery.⁸

The count should further state that the "defect arose from or had not been remedied;"⁹ but it is not necessary to allege that a reasonable time within which to remedy the defect had passed.¹⁰

The negligence¹¹ of the master or person intrusted by him with the duty of seeing that the ways, works, and machinery are in proper condition must also be averred.¹² A complaint which alleged that the defect was "caused by the negligence of defendant in failing to provide good and safe brakes and appliances connected therewith, and by the defendant's negligently and carelessly omitting to keep its brakes on said train in good repair, and knowingly allowing the same to remain out of repair," was held good, and, although the plaintiff failed to offer any evidence to support his allegation of "knowingly," this was an immaterial allegation, which need not have been made.¹³

The name of the person intrusted with the duty of seeing to the ways, works, or machinery need not be averred. "The duty itself being one which rests on the master, at least to the extent of committing it to a competent employe, he is supposed to know, and generally no doubt does know, the identity of the person to whom

⁸ Louisville & N. R. Co. v. Pearson, 97 Ala. 211; Willey v. Boston Electric Light Co., 168 Mass. 40.

⁹ Mobile & O. R. Co. v. George, 94 Ala. 199; Seaboard Mfg. Co. v. Woodson, 94 Ala. 143; Birmingham Ry. & E. Co. v. Baylor, 101 Ala. 488.

¹⁰ Conrad v. Gray, 109 Ala. 130.

¹¹ *Infra*, § 125.

¹² Seaboard Mfg. Co. v. Woodson, 94 Ala. 143.

¹³ Louisville & N. R. Co. v. Coulton, 86 Ala. 129.

it is committed. There is, therefore, no hardship, and no departure from cardinal rules of pleading, in exempting the plaintiff from the averment of the name of such person in actions like this."¹⁴ Nor need the nature of the duties intrusted to such person be stated.¹⁵

§ 122. Negligence of superintendent.

Pleading the negligence of a superintendent.

In Alabama it is held that the name of the person intrusted with superintendence must be averred,¹⁶ or, if unknown, that this fact must be stated. It is also necessary to prove, under the latter allegation, that his name was in fact unknown.¹⁷ In Massachusetts his name is immaterial.¹⁸

The count in other respects should follow closely the words of the statute,¹⁹ and allege negligence²⁰ on the part of the superintendent.

§ 123. Negligence of person to whose orders plaintiff must conform.

Pleading the negligence of a person to whose orders the plaintiff was bound to conform.

Under this subdivision, also, the words of the act must

¹⁴ *McNamara v. Logan*, 100 Ala. 187; *Woodward Iron Co. v. Herndon*, 114 Ala. 191, overruling *Louisville & N. R. Co. v. Bouldin*, 110 Ala. 185.

¹⁵ *Louisville & N. R. Co. v. Orr*, 94 Ala. 602.

¹⁶ *Woodward Iron Co. v. Herndon*, 114 Ala. 191, citing cases.

¹⁷ *Alabama Great Southern R. Co. v. Davis*, 119 Ala. 572.

¹⁸ *Woodbury v. Post*, 158 Mass. 140.

¹⁹ *City Council of Sheffield v. Harris*, 101 Ala. 564; *Bessemer Land & Imp. Co. v. Campbell*, 121 Ala. 50; *Decatur Car Wheel & Mfg. Co. v. Mehaffey* (Ala.) 29 So. 646. See, also, *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143.

²⁰ *Infra*, § 126.

be closely followed, since they state the necessary elements for liability. A count which fails to show that the plaintiff was bound to conform to the order, that the injury resulted from his having so conformed, and that the order was negligent, is bad.²¹

The complaint need not allege the nature of the service or employment of the person to whose orders the plaintiff was bound to conform, nor the particular instructions or directions.²² Nor need it state the particulars wherein the order was negligent.²³

The name of the person to whose orders the plaintiff conformed must, however, be given.²⁴

§ 124. Negligence of person in charge or control.

Pleading the negligence of a person in charge or control of parts of the equipment of a railway.

Alabama requires that the name of the person in charge or control be alleged, or that it be stated that his name is unknown to the plaintiff.²⁵ In the latter event it must be shown as a fact that his name was unknown;²⁶ but, if there is a variance between the name alleged and the one proved, it is waived unless pointed out.²⁷

It is not necessary to aver that an engineer was in the discharge of his duties when it is alleged that he is

²¹ *Postal Telegraph Cable Co. v. Hulsey*, 115 Ala. 193.

²² *Louisville & N. R. Co. v. Orr*, 94 Ala. 602.

²³ *Mobile & O. R. Co. v. George*, 94 Ala. 199.

²⁴ *Mobile & O. R. Co. v. George*, 94 Ala. 199; *McNamara v. Logan*, 100 Ala. 187.

²⁵ *Southern Ry. Co. v. Cunningham*, 112 Ala. 496; *Central of Georgia Ry. v. Lamb*, 124 Ala. 172.

²⁶ *Alabama Great Southern R. Co. v. Davis*, 119 Ala. 572.

²⁷ *Louisville & N. R. Co. v. Thornton*, 117 Ala. 274.

employed by the defendant, and at the time engaged in running the engine.²⁸

Nor is it necessary to allege the person's knowledge of the conditions, or that by reasonable diligence he could know, or any particular acts or omissions constituting the negligence of which complaint is made.²⁹

The count must allege that the engine was "upon a railway."³⁰

§ 125. Notice.

The declaration must allege that notice of the time, place, and cause of the accident was given by the plaintiff to the defendant.

The acts of England, Massachusetts, and Colorado require the giving of a notice of injury by the plaintiff as a condition precedent to his right of action,³¹ and accordingly the declaration must allege the fact of such notice.

The omission to allege notice renders the declaration demurrable,³² although the absence of this allegation may not prevent the declaration being good at common law.³³ The statement that the plaintiff "duly" gave notice is sufficient.³⁴

²⁸ *Woodward Iron Co. v. Herndon*, 114 Ala. 191. See *Pittsburgh, C., C. & St. L. Ry. Co. v. Montgomery*, 152 Ind. 1.

²⁹ *Mobile & O. R. Co. v. George*, 94 Ala. 199; *Alabama Midland Ry. Co. v. McDonald*, 112 Ala. 216; *Southern Ry. Co. v. Arnold*, 114 Ala. 183.

³⁰ *Alabama Great Southern R. Co. v. Davis*, 119 Ala. 572.

³¹ Chapter 3.

³² *Dickie v. Boston & A. R. Co.*, 131 Mass. 516; *supra*, § 33.

³³ *Ryalls v. Mechanics' Mills*, 150 Mass. 190. See *Dolphin v. Plumley*, 167 Mass. 167; *supra*, § 2.

³⁴ *Steffe v. Old Colony R. Co.*, 156 Mass. 262.

If on the trial the admission of the notice is objected to and exception taken, the question does not go up nor is presented under an exception to the refusal to grant a general request to direct a verdict upon all the evidence.³⁵

§ 126. Pleading negligence.

The act has caused no change in the method of pleading negligence.

“Very general averments, little short, indeed, of mere conclusions, of a want of care and consequent injury, leaving out the facts which constitute and go to prove negligence, meet all the requirements of the law.”³⁶

In Alabama, a distinction has been made between negligence simply, and reckless or wanton negligence. “Mere negligence which gives a cause of action is the doing of an act or the omission to act which results in damage, but without intent to do wrong or cause damage. To constitute a willful injury, there must be design, purpose, intent to do wrong and inflict the injury. Then there is that reckless indifference or disregard of the natural or probable consequence of doing an act, or omission of an act, designated, whether accurately or not, in our decisions, as ‘wanton negligence,’ to which is imputed the same degree of culpability, and

³⁵ *Gardner v. New England T. & T. Co.*, 170 Mass. 156.

³⁶ *Laughran v. Brewer*, 113 Ala. 509, citing cases. See *Reed v. Browning*, 130 Ind. 575; *Becker v. Baumgartner*, 5 Ind. App. 576; *Peerless Stone Co. v. Wray*, 10 Ind. App. 324; *Louisville, E. & St. L. C. Ry. Co. v. Hicks*, 11 Ind. App. 588; *Reitman v. Bangart* (Ind. App.) 59 N. E. 1080; *McGonigle v. Kane*, 20 Colo. 292; *Miller v. Union Pac. Ry. Co.*, 4 Fed. 768; *Simpson v. La Plata M. & S. Co.*, 17 Fed. 125. In Indiana, must allege that defect was known to employer. *Dixon v. Western Union Tel. Co.*, 68 Fed. 630.

held to be equivalent to willful injury. A purpose or intent to injure is not an ingredient of wanton negligence. Where either of these exists, if damage ensues, the injury is willful. In wanton negligence, the party doing the act or failing to act is conscious of his conduct, and, without having the intent to injure, is conscious, from his knowledge of existing circumstances and conditions, that his conduct will likely or probably result in injury. A mere error of judgment as to the result of doing an act or the omission of an act, having no evil purpose or intent, or consciousness of probable injury, may constitute simple negligence, but cannot rise to the degree of wanton negligence or willful wrong."³⁷

Although allegations of negligence in general terms are good upon demurrer, yet, if the plaintiff has more definite information, he may be required, by a motion for specifications, to make his allegations specific.³⁸

§ 127. Contributory negligence.

Pleading the plaintiff's contributory negligence.

It was noted in an earlier section that contributory

³⁷ Birmingham Ry. & E. Co. v. Bowers, 110 Ala. 328. "The word 'reckless,' used in each of these charges, is not necessarily the equivalent of wantonness or intention. It may mean, and is often used with no other significance than, mere 'carelessness,' 'heedlessness,' or 'unmindfulness.'" Richmond & D. R. Co. v. Farmer, 97 Ala. 141. See, also, Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412; Stringer v. Alabama M. R. Co., 99 Ala. 367; Alabama Great Southern R. Co. v. Hall, 105 Ala. 599. Evidence of intentional or wanton negligence cannot be given under a complaint which charges only simple negligence. Louisville & N. R. Co. v. Markee, 103 Ala. 160; Jones v. Alabama M. R. Co., 107 Ala. 400.

³⁸ Wilson v. Denver, S. P. & P. R. Co., 7 Colo. 101; Ohio & M. R. (642)

negligence, although technically a defense, is, in Massachusetts, regarded as part of the plaintiff's case, and that under the act, as at common law, it is necessary for his declaration to contain an averment that he was himself in the exercise of due care.³⁹

In Alabama, Indiana, Colorado, and the federal courts, on the other hand, the question of the plaintiff's care must be raised by the defendant.⁴⁰ Therefore, it is unnecessary for the plaintiff to allege his own freedom from fault.⁴¹

This defense, in Alabama, cannot be raised under the

W. Co. v. Collarn, 73 Ind. 265. Such is the practice in Massachusetts.

³⁹ Supra, §§ 84, 118.

⁴⁰ Supra, §§ 84, 118.

Burns' Rev. St. Ind. 1901, c. 359a: "Personal Injuries—Contributory Negligence.—1. That hereafter in all actions for damages brought on account of the alleged negligence of any person, copartnership or corporation for causing personal injuries, or the death of any person, it shall not be necessary for the plaintiff in such action to allege or prove the want of contributory negligence on the part of the plaintiff, or on the part of the person for whose injury or death the action may be brought. Contributory negligence on the part of the plaintiff, or such other person, shall be a matter of defense, and such defense may be proved under the answer of general denial: Provided that this act shall not affect pending litigation." [Acts Ind. Feb. 17, 1899.]

This act is constitutional. Indianapolis St. Ry. Co. v. Robinson (Ind. Sup.) 61 N. E. 197.

Formerly, in Indiana, the plaintiff's due care was part of his case. See Louisville, E. & St. L. C. R. Co. v. Summers, 131 Ind. 241; Bier v. Jeffersonville, M. & I. R. Co., 132 Ind. 78; Sale v. Aurora & L. T. Co., 147 Ind. 324; Citizens' Street R. Co. v. Sutton, 148 Ind. 169.

⁴¹ Mobile & O. R. Co. v. George, 94 Ala. 199; Louisville & N. R. Co. v. Hawkins, 92 Ala. 241; Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412.

general issue,⁴² but must be specially pleaded.⁴³ Failure to plead it to a declaration setting up simple negligence is a waiver of the defense.⁴⁴ Contributory negligence is not an answer to a complaint setting up wanton negligence.⁴⁵ It is held that, if contributory negligence is pleaded to a complaint alleging simple negligence, a replication which sets up wanton negligence is a departure and demurrable,⁴⁶ and that the objection may only be taken by demurrer.⁴⁷ Furthermore, it is necessary to plead the general issue, together with the special plea of contributory negligence, since, if only the latter is pleaded, the defendant admits his negligence.⁴⁸

§ 128. Joinder of counts.

The complaint should contain separate counts, each alleging

⁴² *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412. It may be raised under a general denial in *Indiana*. *Supra*, note 40.

⁴³ *Tennessee C., I. & R. Co. v. Hayes*, 97 Ala. 201; *Birmingham Furnace & Mfg. Co. v. Gross*, 97 Ala. 220; *Tennessee C., I. & R. Co. v. Herndon*, 100 Ala. 451; *Louisville & N. R. Co. v. Mother-shed*, 110 Ala. 143; *Alabama Great Southern R. Co. v. Roach*, 110 Ala. 266. The burden of proving contributory negligence is on the defendant. *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300; *McDonald v. Montgomery St. Ry.*, 110 Ala. 161; *Western Railway v. William-son*, 114 Ala. 131.

⁴⁴ *Alabama Great Southern R. Co. v. Burgess*, 114 Ala. 587.

⁴⁵ *Kansas City, M. & B. R. Co. v. Lackey*, 114 Ala. 152; *Highland Ave. & B. R. Co. v. Robbins*, 124 Ala. 114. When injury is willful, contributory negligence is not a defense. *Indianapolis Union Ry. Co. v. Boettcher*, 131 Ind. 82.

⁴⁶ *George v. Mobile & O. R. Co.*, 109 Ala. 245; *Davis v. Miller*, 109 Ala. 589.

⁴⁷ *Highland Ave. & B. R. Co. v. South*, 112 Ala. 642.

⁴⁸ *Louisville & N. R. Co. v. Hall*, 87 Ala. 708; *McDonald v. Montgomery Street Ry.*, 110 Ala. 161.

a breach of one of the subdivisions of the act, where more than one breach is relied on. A joinder of several breaches in one count is improper.

If several causes of action arising under different subdivisions of the act are relied on, they should be stated in separate counts, and as many of such counts as are necessary may be joined. "It is quite usual in actions for torts, where a single act or transaction is complained of as the cause of the alleged injury, to insert several counts stating that act in varying shapes, to meet different phases of the proof as it may be developed, and to charge in successive counts different breaches of duty as separate grounds of recovery. Each count is treated as the statement of a distinct cause of action, and appropriate issues may be pleaded to them severally."⁴⁹ Thus, a declaration which charged in one count a breach of a common-law duty, negligence of a person in charge and control, negligence of a superintendent, and a defect in the ways, works, or machinery, was held bad.⁵⁰ But when these breaches of duty are stated in separate counts, the complaint sets up but one cause of action.⁵¹ Where, however, the grounds embraced in two or more subdivisions of the act concur to produce the injury, it may be so averred in one count, and the plaintiff must establish both allegations of negligence.⁵²

⁴⁹ *Highland Ave. & B. R. Co. v. Dusenberry*, 94 Ala. 413; *Highland Ave. & B. R. Co. v. Miller*, 120 Ala. 535.

⁵⁰ *Highland Ave. & B. R. Co. v. Dusenberry*, 94 Ala. 413; *Richmond & D. R. Co. v. Weems*, 97 Ala. 270; *Louisville & N. R. Co. v. Mothershed*, 97 Ala. 261; *Clements v. Alabama G. S. R. Co. (Ala.)* 28 So. 643. See *Beauregard v. Webb G. & C. Co.*, 160 Mass. 201.

⁵¹ *Louisville & N. R. Co. v. Mothershed*, 97 Ala. 261.

⁵² *Bridges v. Tennessee C., I. & R. Co.*, 109 Ala. 287.

The passage of the act did not take away the common-law remedy,⁵³ and therefore, "when it is uncertain how the facts will turn out, it may be necessary and proper to join a count on the statute with one on the common-law liability."⁵⁴

A count, under the act, may be joined with a count upon a statute providing for recovery in case of death by negligence; but they are separate causes of action, and the combined effect of them will not give a right of action where recovery is impossible on either one alone.⁵⁵

§ 129. Election of counts.

It seems that where the cause of action is stated in several counts, all under the act, the plaintiff cannot be compelled to elect on which he will proceed; but, if some of the counts are at common law or under a statute, he may be compelled in the discretion of the trial court to select the ones on which he will stand.

"The whole liability of the defendant for the death of an employe ought to be tried in one action, and judgment in that action ought to be a bar to any subsequent action between the same parties for the same cause of action;"⁵⁶ and when this liability is stated in several

⁵³ *Supra*, § 2.

⁵⁴ *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 196; *Clare v. New York & N. E. R. Co.*, 172 Mass. 211; *Chicago & E. I. R. Co. v. Richards* (Ind. App.) 61 N. E. 18.

⁵⁵ *Clark v. New York, P. & B. R. Co.*, 160 Mass. 39. See, also, *Dacey v. Old Colony R. Co.*, 153 Mass. 112; *Clare v. New York & N. E. R. Co.*, 172 Mass. 211; *Colorado C. & I. Co. v. Lamb*, 6 Colo. App. 255; *Buckalew v. Tennessee C., I. & R. Co.*, 112 Ala. 146.

⁵⁶ *Beauregard v. Webb G. & C. Co.*, 160 Mass. 201.

counts it is unsettled whether the plaintiff may be compelled to elect upon which counts he will go to the jury. "There are opinions of this court [in Massachusetts] which tend to show that the trial court, in its discretion, may compel a plaintiff in this class of cases to elect, at the close of the evidence, whether he will go to the jury on the counts at common law or the counts under the statute. Whether a plaintiff can be compelled to elect before the close of the evidence has not been decided; neither has it been decided that in every case of this class the trial court can or ought to compel the plaintiff to elect."⁵⁷ When the counts are all under the act, however, it seems that an election cannot be compelled.⁵⁸

Where a plaintiff had judgment rendered against him upon an action under the employers' liability act, and later sued by a declaration setting up counts at common law and under the railroad statute, it was held that the judgment in the first case was not a bar to subsequent action under the railroad statute; but, "plainly, a plaintiff should not be permitted to retain verdicts both at common law and under the [employers' liability act] for the same personal injuries, and have judgment for the sum of the two verdicts," and the former judgment was a bar to the prosecution of the second action at common law.⁵⁹

⁵⁷ *Clare v. New York & N. E. R. Co.*, 172 Mass. 211, 213, and cases cited. See *May v. Whittier Machine Co.*, 154 Mass. 29; *Brady v. Ludlow Mfg. Co.*, 154 Mass. 468; *Murray v. Knight*, 156 Mass. 518.

⁵⁸ *Beauregard v. Webb G. & C. Co.*, 160 Mass. 201.

⁵⁹ *Clare v. New York & N. E. R. Co.*, 172 Mass. 211, 212.

§ 130. Pleading by the defendant.

Pleading by the defendant by demurrer, general issue, or special pleas.

The defendant may demur to the plaintiff's declaration or complaint, and thereby raise the question whether, as a matter of law, admitting the truth of the facts alleged in the pleading, they state either a cause of action or state that cause of action properly; and these two objections are taken either by a general demurrer to the substance or a special demurrer to the form of the declaration. The manner in which this question is raised and the proceedings had upon it are regulated by the codes or practice acts of the several jurisdictions. Thus, in Massachusetts, where it was contended that the declaration was defective because it did not state in what the negligence of the brakeman consisted, or in what way his incompetence caused the injury complained of, it was said: "The above ground of objection is not open under the demurrer, because it is not specially pointed out, as required by Pub. St. c. 167, § 12. If this objection had been specially pointed out, the plaintiff might, if so advised, have easily avoided it by amending his declaration. In a demurrer which goes to the whole ground of action, or to the whole defense stated in the answer, it is sufficient to aver the cause in the general words of the statute. But where mere defects or omissions in the form of statement are relied on, they must be specially pointed out."⁶⁰

⁶⁰ *Steffe v. Old Colony R. Co.*, 156 Mass. 262. See Civ. Code Ala. 1896, § 3303; *Burns' Rev. St. Ind.* 1901, § 342. Objection that persons are improperly joined may be taken by demurrer. *Colorado C. & I. Co. v. Lamb*, 6 Colo. App. 255; *Owsley v. M. & W. P. R. Co.*, 37 Ala. 560.

The general issue of "not guilty" puts in issue all the material allegations of the complaint.⁶¹ So, in Massachusetts, an answer in general denial under the practice act⁶² denies all the material allegations.

The capacity in which the plaintiff sues is not put in issue by a general denial, and thus, unless the question is specially raised, is admitted. "It need only appear from the complaint that the plaintiff is the personal representative of the person for whose death damages are claimed, and the maintenance of the action will be ascribed to that capacity, without averment that plaintiff sues as administrator or executor, or that the recovery will be assets of the decedent's estate." In Alabama his capacity is raised by the special plea of *ne unques administrator*.⁶³ In Massachusetts it is raised by a special demand for proof of the fact filed within ten days from the time allowed for answer.⁶⁴

The special statute of limitations must be raised in Massachusetts by a special allegation in the answer.⁶⁵ In Colorado it is to be pleaded specially, and may be

⁶¹ Louisville & N. R. Co. v. Trammell, 93 Ala. 350; Civ. Code Ala. 1896, § 3285; Burns' Rev. St. Ind. 1901, § 350 et seq.

⁶² Pub. St. c. 167, §§ 15, 17; Rev. Laws, c. 173, §§ 20, 24.

⁶³ Louisville & N. R. Co. v. Trammell, 93 Ala. 350; Davis v. Miller, 109 Ala. 589. Immaterial that complaint describes persons as heirs at law who are not. Clore v. McIntire, 120 Ind. 262. That deceased left no heirs at law need not be alleged. Columbus & W. Ry. Co. v. Bradford, 86 Ala. 574. That general denial admits plaintiff's capacity, and objection is to be taken by demurrer, see Burns' Rev. St. Ind. 1901, §§ 342, 350. See, also, Denver & R. G. R. Co. v. Woodward, 4 Colo. 1.

⁶⁴ Pub. St. c. 167, § 87; Rev. Laws, c. 173, § 123.

⁶⁵ Pub. St. c. 167, § 20; Rev. Laws, c. 173, § 27.

taken either in the answer, or, when the fault appears on the face of the pleadings, by demurrer.⁶⁶

§ 131. Directing verdict.

When, upon the evidence for the plaintiff, or upon all the evidence, no cause of action appears, it is the duty of the court to direct a verdict for the defendant.

A plaintiff may consent to be nonsuited, but involuntary nonsuits are not, in most jurisdictions, ordered by the court.⁶⁷ "Although a judge may direct, or, to speak more precisely, advise, a nonsuit, when the plaintiff's evidence is in, if in his opinion the jury, on any just view of the evidence, could not find a verdict for the plaintiff, yet it is purely a matter of discretion. He is never bound to do so, and in many cases it is most advisable to submit the evidence to the jury, with suitable instructions, in regard to the law applicable to such case. A refusal to direct a nonsuit, therefore, is no ground of exception."⁶⁸ But if the evidence fails to set out a cause of action it is the duty of the court to direct a verdict for the defendant. "The difference in the two modes is rather of form than of substance, except in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is

⁶⁶ Walker v. Pogue, 2 Colo. App. 149; Owers v. Olathe Silver Min. Co., 6 Colo. App. 9; Haley v. Elliott, 20 Colo. 199. See, also, Hanna v. Jeffersonville R. Co., 32 Ind. 113; Buckalew v. Tennessee C., I. & R. Co., 112 Ala. 146.

⁶⁷ Oscanyan v. Arms Co., 103 U. S. 261, 264; Williams v. Port, 9 Ind. 551. But see Denver, T. & Ft. W. R. Co. v. Smock, 23 Colo. 456. See Civ. Code Ala. 1896, § 3313.

⁶⁸ Morgan v. Ide, 8 Cush. (Mass.) 420, 422.

ended, unless a new trial be granted either upon motion or upon appeal."⁶⁹

When the defendant's motion for a nonsuit or direction of verdict is made, he must rest in order to save his exception to a refusal of it.⁷⁰ By afterwards introducing evidence he is held to have waived it.⁷¹

The power of the court to direct a verdict for the defendant has been elsewhere considered with reference to particular questions.⁷² The rule has been well stated thus: "A jury should be permitted to return a verdict according to its own view of the facts, unless upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it, the

⁶⁹ *Oscanyan v. Arms Co.*, 103 U. S. 261, 264; *Denver & Rio Grande R. Co. v. Iles*, 25 Colo. 19. The nonsuit is not a bar to a new action. *Denver & Rio Grande R. Co. v. Iles*, 25 Colo. 19; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349; *Clapp v. Thomas*, 5 Allen (Mass.) 158. A verdict may be directed on counsel's opening. *Oscanyan v. Arms Co.*, *supra*.

⁷⁰ *Goss v. Calkins*, 162 Mass. 492.

⁷¹ *Denver, T. & Ft. W. R. Co. v. Smock*, 23 Colo. 456; *Northern Pac. R. Co. v. Mares*, 123 U. S. 710; *Runkle v. Burnham*, 153 U. S. 216. But judge may direct verdict, although defendant does not rest. *Hall v. Wakefield & S. St. Ry. Co.*, 178 Mass. 98.

⁷² The court must determine the legal duty (§ 118), and this requires a definition of the several specifications of the act, such as "defect," etc. (§ 54), "person intrusted" (§ 54), "superintendent" (§§ 60, 62), "person to whose orders the plaintiff is bound to conform" (§ 65), "charge or control," and the like (§ 74), sufficiency of notice (§ 28), interpretation of rules and by-laws (§ 72). The court must pass upon the question whether the plaintiff assumed the risk of injury upon entrance into the employment (§ 118), and whether his conduct has disentitled him to recover for injuries caused by risks subsequently arising (§§ 107, 108, 114, 118). So it must also decide whether the plaintiff or the defendant was careless (§§ 54, 118), and whether the cause of the accident is conjectural (§§ 50, 118).

case is palpably for the party asking a peremptory instruction. A mere *scintilla* of evidence in favor of one party does not entitle him, of right, to go to the jury. On the other hand, a case cannot properly be withdrawn from the consideration of the jury simply because, in the judgment of the court, there is a preponderance of evidence in favor of the party asking a peremptory instruction. If the facts are entirely undisputed or uncontradicted, or if, upon any issue dependent upon facts, there is no evidence whatever in favor of one party, or, what is the same thing, if the evidence is so slight as to justify the court in regarding the proof as substantially all one way, then the court may direct a verdict according to its view of the law arising upon such a case.

* * * While the court may instruct the jury as to the law arising upon a given or hypothetical state of facts, it is for the jury, if the facts are disputed, or if there is substantial evidence both ways, even if there be a preponderance of evidence one way, to say what facts are established.”⁷³

§ 132. Fact of insurance not admissible.

The fact that the defendant is insured is not admissible in evidence or a subject for argument.

The fact that the defendant is insured in an employers' liability company cannot be introduced in evidence; but where it appears as a part of an admissible conversation it must go in, and the jury should be cautioned against it.⁷⁴ Thus, where evidence was offered that the defendant said: “I do not want to tell you to sue me,

⁷³ Travelers' Ins. Co. v. Randolph (C. C. A.) 78 Fed. 754, 759.

⁷⁴ Anderson v. Duckworth, 162 Mass. 251.

but, if it was me, I should sue. * * * My machines are all insured, and you will have to sue me to get at the insurance company,"—it was received as an admission, the weight of which might be affected by the fact he was insured, although what was said about insurance was otherwise immaterial.⁷⁵

Arguments drawn from the fact that the defendant is insured are not legitimate.⁷⁶

⁷⁵ *Ellis v. Pierce*, 172 Mass. 220.

⁷⁶ *Tremblay v. Harnden*, 162 Mass. 383.

APPENDIX.

APPENDIX.

A.

ENGLISH EMPLOYERS' LIABILITY ACT.

(43 & 44 Vict. c. 42.)

An act to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service. [7th September, 1880.]

Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. Where after the commencement of this act personal injury is caused to a workman

(1) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or

(2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or

(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or

(4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

2. A workman shall not be entitled under this act to any right of compensation or remedy against the employer in any of the following cases; that is to say:

(1) Under subsection one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

(2) Under subsection four of section one, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of her majesty's principal secretaries of state, or by the Board of Trade or any other department of the

government, under or by virtue of any act of parliament, it shall not be deemed for the purposes of this act to be an improper or defective rule or by-law.

(3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

3. The amount of compensation recoverable under this act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

4. An action for the recovery under this act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this act, any penalty or part of a penalty which may have

been paid in pursuance of any other act of parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this act, and payment has not previously been made of any penalty or part of a penalty under any other act of parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty or part of a penalty under any other act of parliament in respect of the same cause of action.

6—(1) Every action for recovery of compensation under this act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed.

(2) Upon the trial of any such action in a county court before the judge without a jury one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

(3) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions

in county courts. "County court" shall, with respect to Scotland, mean the "sheriff's court," and shall, with respect to Ireland, mean the "civil bill court."

In Scotland any action under this act may be removed to the court of session, at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section nine of the Sheriff Courts (Scotland) Act 1877.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

7. Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered

letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

8. For the purposes of this act, unless the context otherwise requires,—

The expression “person who has superintendence entrusted to him” means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor.

The expression “employer” includes a body of persons corporate or unincorporate.

The expression “workman” means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies.

9. This act shall not come into operation until the first day of January, one thousand eight hundred and eighty-one, which date is in this act referred to as the commencement of this act.¹

10. This act may be cited as the Employers’ Liability Act, 1880, and shall continue in force till the thirty-first day of December one thousand eight hundred and eighty-seven, and to the end of the then next session of parliament, and no longer, unless parliament shall otherwise determine, and all actions commenced under this act before that period shall be continued as if the said act had not expired.

¹ Section 9 repealed by 57 & 58 Vict. c. 56.

B.

ALABAMA EMPLOYERS' LIABILITY ACT.

(Civ. Code Ala. 1896, c. 43, §§ 1749-1751.)

EMPLOYER AND EMPLOYEE.

1749 (2590). Liability of master or employer to servant or employe for injuries.—When a personal injury is received by a servant or employe in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employe, as if he were a stranger, and not engaged in such service or employment, in the cases following:

1. When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in the business of the master or employer.

2. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence.

3. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employe, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed.

4. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master

¹ Act passed in 1885. To be found in Code 1886, §§ 2590-2592.

or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf.

5. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track of a railway. But the master or employer is not liable under this section, if the servant or employe knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that the master or employer, or such superior already knew of such defect or negligence; nor is the master or employer liable under subdivision 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in proper condition.

1750 (2592). Damages exempt.—Damages recovered by the servant or employe, of and from the master or employer, are not subject to the payment of debts, or any legal liabilities incurred by him.

1751 (2591). Personal representative may sue, if injury results in death.—If such injury results in the death of the servant or employe, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts

or liabilities, but shall be distributed according to the statute of distributions.

C.

MASSACHUSETTS EMPLOYERS' LIABILITY ACT.

(Rev. Laws 1901, c. 106.)¹

LIABILITY OF EMPLOYERS TO EMPLOYEES.

If personal injury is caused to an employe, who, at the time of the injury, is in the exercise of due care, by reason of:

Section 71. First, a defect in the condition of the ways, works or machinery connected with or used in the busi-

¹ Acts 1887, c. 270:

Section 1. Where, after the passage of this act, personal injury is caused to an employe, who is himself in the exercise of due care and diligence at the time:

(1) By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works or machinery were in proper condition; or

(2) By reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer; or*

(3) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine or train upon a railroad,† the employe, or, in case

* The clause beginning "or, in the absence of such superintendent," added by Acts 1894, c. 490, sec. 1.

† This clause is construed by Acts 1897, c. 491:

"Section 1. One or more cars in motion, whether attached to an engine or not, shall constitute a train, within the meaning of clause three of sec-

ness of the employer, which arose from, or had not been discovered or remedied in consequence of, the negligence of the employer or of a person in his service who had been intrusted by him with the duty of seeing that the ways, works or machinery were in proper condition; or,

Second, the negligence of a person in the service of the employer who was intrusted with and was exercis-

the injury results in death the legal representatives of such employe, shall have the same right of compensation and remedies against the employer as if the employe had not been an employe of nor in the service of the employer, nor engaged in its work. And in case such death is not instantaneous, or is preceded by conscious suffering, said legal representatives may in the action brought under this section, except as hereinafter provided, also recover damages for such death. The total damages awarded hereunder, both for said death and said injury, shall not exceed five thousand dollars, and shall be apportioned by the jury between the legal representatives and the persons, if any, entitled, under the succeeding section of this act, to bring an action for instantaneous death. If there are no such persons then no damages for such death shall be recovered, and the damages, so far as the same are awarded for said death, shall be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable.* A car in use by or in the possession of a railroad company shall be considered a part of the ways, works, or machinery of the company using or having the same in possession, within the meaning of this act, whether such car is owned by it or by some other company or person.†

tion one of chapter two hundred and seventy of the Acts of the year eighteen hundred and eighty-seven, and acts in addition thereto or in amendment thereof.

"Sec. 2. Any person who, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, or train, shall be deemed to be a person in charge or control of a signal, switch, or train, within the meaning of clause three of section one of chapter two hundred and seventy of the Acts of the year eighteen hundred and eighty-seven, and acts in addition thereto or in amendment thereof."

* The last three sentences beginning, "And in case such death," added by Acts 1892, c. 260, sec. 1.

† The last sentence beginning, "A car in use by," added by Acts 1893, c. 359, sec. 1.

ing superintendence and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer; or,

Third, the negligence of a person in the service of the employer who was in charge or control of a signal, switch, locomotive engine or train upon a railroad; the employe, or his legal representatives, shall, subject to the provisions of the eight following sections, have the same rights to compensation and of action against the employer as if he had not been an employe, nor in the service, nor engaged in the work, of the employer.

A car which is in use by, or which is in possession of, a railroad corporation shall be considered as a part of the ways, works or machinery of the corporation which uses or has it in possession, within the meaning of clause one of this section, whether it is owned by such corpo-

Sec. 2. Where an employe is instantly killed or dies without conscious suffering, as the result of the negligence of an employer, or of the negligence of any person for whose negligence the employer is liable under the provisions of this act, the widow of the deceased, or in case there is no widow, the next of kin, provided that such next of kin were at the time of the death of such employe dependent upon the wages of such employe for support, may maintain an action for damages therefor and may recover in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered.

Sec. 3. Except in actions brought by the personal representatives under section one of this act to recover damages for both the injury and death of an employe,* the amount of compensation receivable under this act in cases of personal injury shall not exceed the sum of four thousand dollars. In case of death which follows instantaneously or without conscious suffering,† compensation in lieu

* The first clause, "Except * * * employe," added by Acts 1892, c. 260, sec. 2.

† The words, "which follows instantaneously or without conscious suffering," added by Acts 1892, c. 260, sec. 2.

ration or by some other company or person. One or more cars which are in motion, whether attached to an engine or not, shall constitute a train within the meaning of clause three of this section, and whoever, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive engine or train shall be deemed to be a person in charge or control of a signal, switch, locomotive engine or train within the meaning of said clause.

Section 72. If the injury described in the preceding section results in the death of the employe, and such death is not instantaneous or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of

thereof may be recovered in not less than five hundred and not more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable; and no action for the recovery of compensation for injury or death under this act shall be maintained, unless notice of the time, place and cause of the injury is given to the employer within sixty days, and the action is commenced within one year, from the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing, signed by the person injured or by some one in his behalf; but if, from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in said section, he may give the same within ten days after such incapacity is removed, and, in case of his death without having given the notice and without having been for ten days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give such notice within sixty days after his appointment.* But no

* This sentence, "The notice required," etc., was added by Acts 1888, c. 155, sec. 1, but the original act and the act of 1888 provided that the notice should be given within thirty days. This was changed by Acts 1900, c. 446, permitting the notice to be given by the party injured within sixty days, or, if by his administrator or executor, within sixty days from the latter's appointment. See, also, an act relating to notices in cases of injuries (Acts 1894, c. 389, quoted sec. 27, note 2).

the following section, the legal representatives of said employe may, in the action brought under the provisions of the preceding section, recover damages for the death in addition to those for the injury.

Section 73. If, as a result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of section seventy-one, an employe is instantly killed, or dies without conscious suffering, his widow or, if he leaves no widow, his next of kin, who, at the time of his death,

notice given under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury: provided, it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.

Sec. 4. Whenever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, or whenever such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employes of such contractor or subcontractor, by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer, or furnished by him, and if such defect arose or had not been discovered or remedied, through the negligence of the employer or of some person intrusted by him with the duty of seeing that they were in proper condition.

Sec. 5. An employe or his legal representatives shall not be entitled under this act to any right of compensation or remedy against his employer in any case where such employe knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had intrusted to him some general superintendence.

Sec. 6. Any employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employe for personal injuries for which compensation may be recovered under this act, or to any relief society formed under chapter two hundred and forty-four of the Acts of the year eighteen hun-

were dependent upon his wages for support, shall have a right of action for damages against the employer.

Section 74. If, under the provisions of either of the two preceding sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable. The amount of damages which may be awarded in an action under the provisions of section seventy-one for a personal injury to an employe, in which no damages for his death are awarded under the provisions of section seventy-two, shall not exceed four thousand dollars. The amount of damages which may be awarded in such action, if damages for his death are awarded under the provisions of section seventy-two, shall not exceed five thousand dollars for both the injury and the death, and shall be apportioned by the jury between the legal representatives of the employe and the persons who would have been entitled, under the provisions of section seventy-three, to bring an action for his death if it had been instantaneous or without conscious suffering. The amount of damages which may be awarded in an action brought under the provisions of section seventy-three

dred and eighty-two, as authorized by chapter one hundred and twenty-five of the Acts of the year eighteen hundred and eighty-six may prove, in mitigation of the damages recoverable by an employe under this act, such proportion of the pecuniary benefit which has been received by such employe from any such fund or society on account of such contribution of said employer as the contribution of such employer to such fund or society bears to the whole contribution thereto.

Sec. 7. This act shall not apply to injuries caused to domestic servants, or farm laborers, by other fellow employes, and shall take effect on the first day of September, eighteen hundred and eighty-seven.

Approved May 14, 1887.

shall not be less than five hundred nor more than five thousand dollars.

Section 75. No action for the recovery of damages for injury or death under the provisions of sections seventy-one to seventy-four, inclusive, shall be maintained unless notice of the time, place and cause of the injury is given to the employer within sixty days, and the action is commenced within one year, after the accident which causes the injury or death. Such notice shall be in writing, signed by the person injured or by a person in his behalf; but if from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in this section, he may give it within ten days after such incapacity has been removed, and if he dies without having given the notice and without having been for ten days at any time after his injury of sufficient capacity to give it, his executor or administrator may give such notice within sixty days after his appointment. A notice given under the provisions of this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place or cause of the injury, if it is shown that there was no intention to mislead, and that the employer was not in fact misled thereby. The provisions of section twenty-two of chapter fifty-one shall apply to notices under the provisions of this section.

Section 76. If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcon-

tract shall not bar the liability of the employer for injuries to the employes of such contractor or subcontractor, caused by any defect in the condition of the ways, works, machinery or plant, if they are the property of the employer or are furnished by him and if such defect arose, or had not been discovered or remedied, through the negligence of the employer or of some person intrusted by him with the duty of seeing that they were in proper condition.

Section 77. An employe or his legal representatives shall not be entitled under the provisions of sections seventy-one to seventy-four, inclusive, to any right of action for damages against his employer if such employe knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer who was intrusted with general superintendence.

Section 78. An employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employe for personal injuries for which compensation may be recovered under the provisions of sections seventy-one to seventy-four, inclusive, or to any relief society formed under the provisions of sections seventeen, eighteen and nineteen of chapter one hundred and twenty-five, may prove in mitigation of the damages recoverable by an employe under the provisions of said sections, such proportion of the pecuniary benefit which has been received by such employe from any such fund or society on account of such contribution of said employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

Section 79. The provisions of the eight preceding sections shall not apply to injuries caused to domestic servants or farm laborers by fellow employees.

D.

INDIANA EMPLOYERS' LIABILITY ACT.

(Burns' Rev. St. Ind. 1901.)¹

INJURIES TO EMPLOYEES.

Sec. 7083. Liability for Personal Injuries.—1. That every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person intrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform.

Third. Where such injury resulted from the act or omission of any person done or made in obedience to

¹Acts Ind. 1893, c. 130.

any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employee or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employee or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.

7084. [Repealed by Acts 1895, c. 64.]²

7085. Measure of Damages.—3. The damages re-

² Sec. 7084. When damages not recoverable.—2. Neither an employe nor his legal representative shall be entitled under this act to any right of compensation or remedy against the corporation in any case where the injury results from obedience to any order which subjects the employe to palpable danger, nor where the injury was caused by the incompetency of the co-employe, and such incompetency was known to the employe injured; or such injured employe, in the exercise of reasonable care, might have discovered such incompetency; unless the employe so injured gave or caused to be given information thereof to the corporation or to some superior intrusted with the general superintendence of such co-employe, and such corporation failed or refused to discharge such incompetent employe within a reasonable time, or failed or refused within a reasonable time to investigate the alleged incompetency of the co-employe or superior, and discharge him if found incompetent.

coverable under this act, shall be commensurate with the injury sustained unless death results from such injury, when, in such case, the action shall survive and be governed in all respects by the law now in force as to such actions: provided, that where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and, pending such appeal, the injured person dies, and the judgment rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representative.

7086. Laws of Other States not a Defense.—4. In case any railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state.

7087. Contracts of Release Void.—5. All contracts made by railroads or other corporations with their employes, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employe having a right of action under the provisions of this act are hereby declared null and void. The provisions of this act, however, shall not apply to any injuries sustained before it takes effect, nor shall it affect in any manner any suit or legal proceedings pending at the time it takes effect.

E.

COLORADO EMPLOYERS' LIABILITY ACT.

(Mills' Supp. Ann. St. Colo. 1891-1896.) ¹

1511a. Where, after the passage of this act, personal injury is caused to an employe, who is himself in the exercise of due care and diligence at the time;

(1) By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer, or of any person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works and machinery were in proper condition; or

(2) By reason of the negligence of any person in the service of the employer, entrusted with exercising superintendence whose sole or principal duty is that of superintendence;

(3) By reason of the negligence of any person in the service of the employer who has the charge or control of any switch, signal, locomotive engine or train upon a railroad,—the employe, or in case the injury results in death the parties entitled by law to sue and recover for such damages, shall have the same right of compensation and remedy against the employer, as if the employe had not been an employe of or in the service of the employer or engaged in his or its works. [Laws 1893, p. 129, § 1.]

1511b. The amount of compensation recoverable under this act, in case of a personal injury resulting sole-

¹ Sess. Laws 1893, c. 77.

ly from the negligence of a co-employee, shall not exceed the sum of five thousand dollars. No action for the recovery of compensation for injury or death under this act shall be maintained unless written notice of the time, place and cause of the injury is given to the employer within sixty days, and the action is commenced within two years from the occurrence of the accident causing the injury or death. But no notice given under the provisions of this section shall be deemed invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of injury: provided, it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby. [Laws 1893, p. 129, § 2.]

1511c. Whenever an employe enters into a contract, either written or verbal, with an independent contractor, to do part of such employer's work, or whenever such contractor enters into a contract with a subcontractor to do all or a part of the work comprised in such contract or contracts with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employes of such contractor or subcontractor, by reason of any defect in the condition of the ways, works, machinery or plant, if they are the property of the employer or furnished by him, and if such defect arose or had not been discovered or remedied through the negligence of the employer or of some person entrusted by him with the duty of seeing that they were in proper condition. [Laws 1893, p. 130, § 3.]

1511d. An employe or those entitled by law to sue and recover, under the provisions of this act, shall not be entitled under this act to any right of compensation or remedy against his employer in any case where such

employe knew of the defect or negligence which caused the injury, and failed within a reasonable time to give or cause to be given information thereof to the employer or to some person superior to himself in the service of his employer, who had entrusted to him some general superintendence. [Laws 1893, p. 130, § 4.]

1511e. If the injury sustained by the employe is clearly the result of the negligence, carelessness or misconduct of a co-employe the co-employe shall be equally liable under the provisions of this act, with the employer, and may be made a party defendant in all actions brought to recover damages for such injury. Upon the trial of such action, the court may submit to and require the jury to find a special verdict upon the question as to whether the employer or his vice principal was or was not guilty of negligence proximately causing the injury complained of; or whether such injury resulted solely from the negligence of the co-employe, and in case the jury by their special verdict find that the injury was solely the result of the negligence of the employer or vice principal, then and in that case the jury shall assess the full amount of plaintiff's damages against the employer, and the suit shall be dismissed as against the employe; but in case the jury by their special verdict find that the injury resulted solely from the negligence of the co-employe, the jury may assess damages both against the employer and employe. [Laws 1893, pp. 130, 131, § 5.]

Approved April 8, 1893.

COLORADO FELLOW SERVANTS' ACT.

(Sess. Laws 1901, c. 67.)

DAMAGES—CO. EMPLOYE.

An act to give a right of action against an employer for

injuries or death resulting to his agents, employes, or servants, either from the employer's negligence or from the negligence of some of his other employes, servants or agents, and to repeal all acts and parts of acts in conflict herewith.

Be it enacted by the general assembly of the state of Colorado :

Section 1. That every corporation, company or individual who may employ agents, servants or employes, such agents, servants or employes being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employe or servant, resulting from the carelessness, omission of duty or negligence of such employer, or which may have resulted from the carelessness, omission of duty or negligence of any other agent, servant or employe of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer.

Sec. 2. All acts, and parts of acts, in conflict herewith are hereby repealed; provided, however, that this act shall not be construed to repeal or change the existing laws relating to the right of the person injured, or in case of death, the right of the husband or wife, or other relatives of a deceased person, to maintain an action against the employer.

Approved March 28, 1901.²

² The intention of this statute is to do away with the fellow-servant exemption in all businesses and as to all classes of servants. See *Brooks v. Mississippi Cotton Oil Co.*, 76 Miss. 874. It is thus more comprehensive than the employers' liability act (see section 2), or the railroad statutes of other states (see section 73, note 1; *Hunt v. Chicago & N. W. R. Co.*, 26 Iowa, 363; *Murphy v. Chicago, R. I. &*

WORKMEN'S COMPENSATION ACT, 1897.

(60 & 61 Vict. c. 37.)

An act to amend the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment. [6th August. 1897.]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spirit-

P. R. Co., 45 Iowa, 661). It has no retroactive effect (see section 3), and is constitutional (see section 4).

It is no longer necessary to inquire into the relative rank of the negligent or the injured servant (*Houser v. Chicago, R. I. & P. R. Co.*, 60 Iowa, 230), nor the nature of the duties of the former. The care used by the master in selecting his servants is also immaterial, since, whether he has been negligent or not, he is nevertheless responsible for his servant's acts.

By this abrogation of the fellow-servant doctrine, the plaintiff is given the rights and is under the disabilities of one invited to the premises of another (section 83), and the master may defend against an injury to the same extent as if the plaintiff were not his servant (section 82). The liability imposed upon the master for the negligence of his servants causing injury to the plaintiff is the same as if the plaintiff were a stranger. He is only answerable when the negligence arises within the scope of the employment. Thus, under the Iowa statute, one servant struck at another, who, dodging, knocked the plaintiff off a car on which they were at work, and it was held that, as the negligence was not within the scope of the employment, there could be no liability. *Kincade v. Chicago, M. & St. P. Ry. Co.*, 107 Iowa, 682. So, under the Wisconsin act, where the defendant was building a railroad, and the men, at their own request, lived in a car furnished by the railroad, and went to and from their work on handcars, there was no liability for injuries received through the collision of one handcar with another on the return from work. *Benson v. Chicago, St. P., M. & O. Ry. Co.*, 78 Minn. 303. See, also, section 13. The Colorado statute does not say, as do some of the others, that the negligence must be in discharge of the servant's duties, but it is to be so construed, since the negligent employe is an "agent or servant" only while performing his stipulated duties and acting within the scope of his authority. It does not appear that the statute requires any change in the common-law rule of *respondeat superior*, but simply makes this rule

ual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1—(1) If in any employment to which this act ap-

pplicable to servants. To give a cause of action, the plaintiff would be required to show, as would a stranger, that the negligence arose within the scope of employment.

The statute has not affected the doctrine of assumption of risk further than to strike from its disabilities the fellow-servant exemption. The plaintiff cannot recover for the incidental dangers of the business (sections 90, 91), or for obvious dangers existing when he entered the employment (sections 92, 95), or those subsequently arising which he knows and appreciates (section 114). It was at first doubted whether the passage of the employers' liability act had not affected these risks, but it is now settled that it did not (section 117). Thus, the servant takes the risk of the conditions of the place of work, as the presence of cattle chutes near the track (*Keist v. Chicago Great Western R. Co.*, 110 Iowa, 32), or improper appliances furnished for his use (*Anderson v. Illinois Cent. R. Co.*, 109 Iowa, 524). Even though another servant may negligently direct the use of unsafe materials, etc., the plaintiff cannot recover if he knows their dangerous condition, and uses them. Such is the ruling under the Georgia and Florida statutes. "The deceased was an employe of the defendant. He used a defectively stanchioned car, with knowledge of its defective and dangerous condition, himself aiding in rendering it defective. The defendant had done its duty in supplying perfectly constructed and securely stanchioned cars, and had no direct instrumentality in putting the car in its temporarily defective condition. It was rendered temporarily defective by an ill-advised order from another employe of the same defendant, who was a superior officer, it is true; but, under these repeated decisions, it makes no difference under this statute. Where an employe uses dangerous and defective appliances with knowledge of their dangerousness and defectiveness, he cannot recover, even though he uses them by the direct command of a superior who is also an employe of the same company." *Duval v. Hunt*, 34 Fla. 85, 109. Also *Western A. R. Co. v. Adams*, 55 Ga. 279; *Baker v. Western & A. R. Co.*, 68 Ga. 699.

The plaintiff must himself exercise care, and, if the negligence of another exposes him to danger, he is bound to use care to avoid it. *Roul v. East Tennessee, V. & G. Ry. Co.*, 85 Ga. 197.

plies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this act.

(2) Provided that:—

(a) The employer shall not be liable under this act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed;

(b) When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this act, or take the same proceedings as were open to him before the commencement of this act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this act, and shall not be liable to any proceedings independently of this act, except in case of such personal negligence or wilful act as aforesaid;

(c) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed.

(3) If any question arises in any proceedings under this act as to the liability to pay compensation under this act (including any question as to whether the employment is one to which this act applies), or as to the amount or duration of compensation under this act,

the question, if not settled by agreement, shall, subject to the provisions of the first schedule to this act, be settled by arbitration, in accordance with the second schedule to this act.

(4) If, within the time hereinafter in this act limited for taking proceedings, an action is brought to recover damages independently of this act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this act, the action shall be dismissed; but the court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this act.

In any proceeding under this subsection, when the court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this act.

(5) Nothing in this act shall affect any proceeding for a fine under the enactments relating to mines or factories, or the application of any such fine, but if any such fine, or any part thereof, has been applied for the benefit of the person injured, the amount so applied shall be taken into account in estimating the compensation under this act.

2—(1) Proceedings for the recovery under this act of compensation for an injury shall not be maintain-

able unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death. Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause.

(2) Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

(3) The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

(4) The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.

(5) Where the employer is a body of persons corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to the employer at, the office, or, if there be more than one office, any one of the offices of such body.

3—(1) If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, is on the whole not less favorable to the general body of workmen and their dependents than the provisions of this act, the employer may, until the certificate is revoked, contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of this act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this act shall apply notwithstanding any contract to the contrary made after the commencement of this act.

(2) The registrar may give a certificate to expire at the end of a limited period not less than five years.

(3) No scheme shall be so certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring.

(4) If complaint is made to the Registrar of Friendly Societies by or on behalf of the workmen of any employer that the provisions of any scheme are no longer on the whole so favourable to the general body of workmen of such employer and their dependents as the provisions of this act, or that the provisions of such scheme

are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the registrar shall examine into the complaint, and, if satisfied that good cause exists for such complaint, shall, unless the cause of complaint is removed, revoke the certificate.

(5) When a certificate is revoked or expires any moneys or securities held for the purpose of the scheme shall be distributed as may be arranged between the employer and workmen, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion.

(6) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the Registrar of Friendly Societies.

(7) The Chief Registrar of Friendly Societies shall include in his annual report the particulars of the proceedings of the registrar under this act.

4. Where, in an employment to which this act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this act or in respect of personal negligence or wilful act independently of this act) by such contractor, or would

be so payable if such contractor were an employer to whom this act applies.

Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section.

This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively.

5—(1) Where any employer becomes liable under this act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company of the company having commenced to be wound up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and the judge of the county court may direct the insurers to pay such sum into the Post Office Savings Bank in the name of the registrar of such court, and order the same to be invested or applied in accordance with the provisions of the first schedule hereto with reference to the investment in the Post Office Savings Bank of any sum allotted as compensation, and those provisions shall apply accordingly.

(2) In the application of this section to Scotland, the words "have a first charge upon" shall mean "be preferentially entitled to."

6. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the

employer to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this act, but not against both, and if compensation be paid under this act, the employer shall be entitled to be indemnified by the said other person.

7—(1) This act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined on in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof.

(2) In this act—

“Railway” means the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and includes a light railway made under the Light Railways Act, 1896; and “railway” and “railway company” have the same meaning as in the said acts of 1873 and 1896:

“Factory” has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, and every laundry worked by steam. water. or other mechanical power:

“Mine” means a mine to which the Coal Mines Regu-

lation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, applies:

“Quarry” means a quarry under the Quarries Act, 1894:

“Engineering work” means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used:

“Undertakers” in the case of a railway means the railway company; in the case of a factory, quarry, or laundry means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895; in the case of a mine means the owner thereof within the meaning of the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, as the case may be, and in the case of an engineering work means the person undertaking the construction, alteration, or repair; and in the case of a building means the persons undertaking the construction, repair or demolition:

“Employer” includes any body of persons corporate or unincorporate and the legal personal representative of a deceased employer:

“Workman” includes every person who is engaged in an employment to which this act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference

to his legal personal representative or to his dependents, or other person to whom compensation is payable:

“Dependents” means—

(a) In England and Ireland, such members of the workman’s family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death; and

(b) In Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death.

(3) A workman employed in a factory which is a shipbuilding yard shall not be excluded from this act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard.

8—(1) This act shall not apply to persons in the naval or military service of the crown, but otherwise shall apply to any employment by or under the crown to which this act would apply if the employer were a private person.

(2) The treasury may, by warrant laid before parliament, modify for the purposes of this act their warrant made under section one of the Superannuation Act, 1887, and notwithstanding anything in that act, or any such warrant, may frame a scheme with a view to its being certified by the Registrar of Friendly Societies under this act.

9. Any contract existing at the commencement of this act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment,

shall not, for the purposes of this act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this act.

10—(1) This act shall come into operation on the first day of July one thousand eight hundred and ninety-eight.

(2) This act may be cited as the Workmen's Compensation Act, 1897.

SCHEDULES.

First Schedule—Scale and Conditions of Compensation—Scale.

(1) The amount of compensation under this act shall be—

(A) Where death results from the injury—

(i) If the workman leaves any dependents wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer;

(ii) If the workman does not leave any such dependents, but leaves any dependents in part dependent upon his earnings at the time of his death, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this act, to be reasonable and proportionate to the injury to the said dependents; and

(iii) If he leaves no dependents, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds;

(B) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.

(2) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity.

(3) Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and any proceeding under this act in relation to com-

pensation, shall be suspended until such examination takes place.

(4) The payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependents, or, if he leaves no dependents, to the person to whom the expenses are due; and if made to the legal personal representative shall be paid by him to or for the benefit of the dependents or other person entitled thereto under this act.

(5) Any question as to who is a dependent, or as to the amount payable to each dependent, shall, in default of agreement, be settled by arbitration under this act.

(6) The sum allotted as compensation to a dependent may be invested or otherwise applied for the benefit of the person entitled thereto, as agreed, or as ordered by the committee or other arbitrator.

(7) Any sum which is agreed or is ordered by the committee or arbitrator to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the county court in his name as registrar.

(8) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Post Office Savings Bank, or be accepted by the postmaster-general as a deposit in the name of the registrar as such, and the provisions of any statute or regulations respecting the limits of deposits in savings bank, and the declaration to be made by a depositor, shall not apply to such sums.

(9) No part of any money invested in the name of the registrar of any county court in the Post Office Sav-

ings Bank under this act shall be paid out, except upon authority addressed to the postmaster-general by the treasury or by the judge of the county court.

(10) Any person deriving any benefit from any moneys invested in a post office savings bank under the provisions of this act may, nevertheless, open an account in a post office savings bank or in any other savings bank in his own name without being liable to any penalties imposed by any statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank.

(11) Any workman receiving weekly payments under this act shall, if so required by the employer, or by any person by whom the employer is entitled under this act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, or such other person; but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this act, as mentioned in the second schedule to this act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.

(12) Any weekly payment may be reviewed at the

request either of the employer or of the workman, and on such review may be ended, diminished or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this act.

(13) Where any weekly payment has been continued for not less than six months, the liability therefor may, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled, in default of agreement, by arbitration under this act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above mentioned.

(14) A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same.

(15) Where a scheme certified under this act provides for payment of compensation by a friendly society, the provisions of the proviso to the first subsection of section eight, section sixteen, and section forty-one of the Friendly Societies Act, 1896, shall not apply to such society in respect of such scheme.

(16) In the application of this schedule to Scotland the expression "registrar of the county court" means "sheriff clerk of the county" and "judge of the county court" means "sheriff."

(17) In the application of this act to Ireland the provisions of the County Officers and Courts (Ireland) Act, 1877, with respect to money deposited in the Post Office Savings Bank under that act shall apply to money invested in the Post Office Savings Bank under this act.

Second Schedule—Arbitration.

The following provisions shall apply for settling any matter which under this act is to be settled by arbitration:—

(1) If any committee, representative of an employer and his workmen, exists with power to settle matters under this act in the case of the employer and workmen, the matter shall, unless either party objects, by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided.

(2) If either party so objects, or there is no such committee, or the committee so refers the matter or fails to settle the matter within three months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the county court judge, according to the procedure prescribed by rules of court, or if in England the lord chancellor so authorises, according to the like procedure, by a single arbitrator appointed by such county court judge.

(3) Any arbitrator appointed by the county court judge shall, for the purposes of this act, have all the powers of a county court judge, and shall be paid out of moneys to be provided by parliament in accordance with regulations to be made by the treasury.

(4) The Arbitration Act, 1889, shall not apply to any arbitration under this act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under

this act shall be final, unless within the time and in accordance with the conditions prescribed by rules of the supreme court either party appeals to the court of appeal; and the county court judge, or the arbitrator appointed by him, shall, for the purpose of an arbitration under this act, have the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaint in the county court.

(5) Rules of court may make provision for the appearance in any arbitration under this act of any party by some other person.

(6) The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. The costs, whether before an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules.

(7) In the case of the death or refusal or inability to act of an arbitrator, a judge of the high court at chambers may, on the application of any party, appoint a new arbitrator.

(8) Where the amount of compensation under this act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the said committee or arbitrator, or by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register

without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment. Provided that the county court judge may at any time rectify such register.

(9) Where any matter under this act is to be done in a county court, or by to or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by to or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or if they reside in different districts the district in which the accident out of which the said matter arose occurred, without prejudice to any transfer in manner provided by rules of court.

(10) The duty of a county court judge under this act, or of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly, and rules of court may be made both for any purpose for which this act authorizes rules of court to be made, and also generally for carrying into effect this act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of the county courts appointed for the making of rules under section one hundred and sixty-four of the County Courts Act, 1888, and when allowed by the lord chancellor, as provided by that section, shall have full effect without any further consent.

(11) No court fee shall be payable by any party in respect of any proceeding under this act in the county court prior to the award.

(12) Any sum awarded as compensation shall be paid on the receipt of the person to whom it is payable under any agreement or award, and his solicitor or agent shall not be entitled to recover from him, or to claim a lien on, or deduct any amount for costs from, the said sum awarded, except such sum as may be awarded by the arbitrator or county court judge, or an application made by either party to determine the amount of costs to be paid to the said solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court.

(13) The secretary of state may appoint legally qualified medical practitioners for the purpose of this act, and any committee, arbitrator, or judge may, subject to regulations made by the secretary of state and the treasury, appoint any such practitioner to report on any matter which seems material to any question arising in the arbitration; and the expense of any such medical practitioner shall, subject to treasury regulations, be paid out of moneys to be provided by parliament.

(14) In the application of this schedule to Scotland—

(a) "Sheriff" shall be substituted for "county court judge," "sheriff court" for "county court," "action" for "plaint," "sheriff clerk" for "registrar of the county court," and "act of sederunt" for "rules of court."

(b) Any award or agreement as to compensation under this act may be competently recorded for execution in the books of council and session or sheriff court books, and shall be enforceable in like manner as a recorded decree arbitral:

(c) Any application to the sheriff as arbitrator shall

be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorized in writing to appear for them and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the court of session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced.

(15) Paragraphs four and seven of this schedule shall not apply to Scotland.

(16) In the application of this schedule to Ireland the expression "county court judge" shall include the recorder of any city or town.

An act to extend the benefits of the Workmen's Compensation Act, 1897, to workmen in agriculture. 63 & 64 Vict. c. 22. [30th July, 1900.]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1—(1) From and after the commencement of this act, the Workmen's Compensation Act, 1897, shall apply to the employment of workmen in agriculture by any employer who habitually employs one or more workmen in such employment.

(2) Where any such employer agrees with a contractor for the execution by or under that contractor of

any work in agriculture, section four of the Workmen's Compensation Act, 1897, shall apply in respect of any workman employed in such work as if that employer were an undertaker within the meaning of that act.

Provided that, where the contractor provides and uses machinery driven by mechanical power for the purpose of threshing, ploughing, or other agricultural work, he, and he alone, shall be liable under this act to pay compensation to any workman employed by him on such work.

(3) Where any workman is employed by the same employer mainly in agricultural but partly or occasionally in other work, this act shall apply also to the employment of the workman in such other work.

The expression "agriculture" includes horticulture, forestry, and the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry, or bees, and the growth of fruit and vegetables.

2. This act may be cited as the Workmen's Compensation Act, 1900, and shall be read as one with the Workmen's Compensation Act, 1897, and that act and this act may be cited together as the Workmen's Compensation Acts, 1897 and 1900.

3. This act shall come into operation on the first day of July, one thousand nine hundred and one.

G.

NEW YORK EMPLOYERS' LIABILITY ACT.

(Laws 1902, c. 600.)

An Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by employes.

The people of the state of New York, represented in senate and assembly, do enact as follows:

Section 1. Where, after this act takes effect, personal injury is caused to an employe who is himself in the exercise of due care and diligence at the time:

1. By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works or machinery were in proper condition;

2. By reason of the negligence of any person in the service of the employer intrusted with and exercising superintendence whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer;

3. The employe, or in case the injury results in death, the executor or administrator of a deceased employe who has left him surviving a husband, wife or next of kin, shall have the same right of compensation and remedies against the employer as if the employe had not been an employe of nor in the service of the employer nor engaged in his work. The provisions of law relating to actions for causing death by negligence, so far as the same are consistent with this act, shall apply to an action

brought by an executor or administrator of a deceased employe suing under the provisions of this act.

Sec. 2. No action for recovery of compensation for injury or death under this act shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within one hundred and twenty days and the action is commenced within one year after the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing and signed by the person injured or by some one in his behalf, but if from physical or mental incapacity it is impossible for the person injured to give notice within the time provided in said section, he may give the same within ten days after such incapacity is removed. In case of his death without having given such notice, his executor or administrator may give such notice within sixty days after his appointment, but no notice under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury if it be shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby. The notice required by this section shall be served on the employer or if there is more than one employer, upon one of such employers, and may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. The notice may be served by post by letter addressed to the person on whom it is to be served, at his last known place of residence or place of business and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post. When the employer is a corporation, notice shall be served by delivering the same

or by sending it by post addressed to the office or principal place of business of such corporation.

Sec. 3. An employe, by entering upon or continuing in the service of the employer, shall be presumed to have assented to the necessary risks of the occupation or employment and no others. The necessary risks of the occupation or employment shall, in all cases arising after this act takes effect be considered as including those risks, and those only, inherent in the nature of the business which remain after the employer has exercised due care in providing for the safety of his employes, and has complied with the laws affecting or regulating such business or occupation for the greater safety of such employes. In an action maintained for the recovery of damages for personal injuries to an employe received after this act takes effect, owing to any cause for which the employer would otherwise be liable, the fact that the employe continued in the service of the employer in the same place and course of employment after the discovery by such employe, or after he had been informed of, the danger of personal injury therefrom, shall not, as a matter of law, be considered as an assent by such employe to the existence or continuance of such risks of personal injury therefrom, or as negligence contributing to such injury. The question whether the employe understood and assumed the risk of such injury, or was guilty of contributory negligence, by his continuance in the same place and course of employment with knowledge of the risk of injury shall be one of fact, subject to the usual powers of the court in a proper case to set aside a verdict rendered contrary to the evidence. An employe, or his legal representative, shall not be entitled under this act to any right of compensation or remedy against the employer in any case where such employe knew of the

defect or negligence which caused the injury and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer who had intrusted to him some general superintendence, unless it shall appear on the trial that such defect or negligence was known to such employer, or superior person, prior to such injuries to the employe.¹

¹ The last sentence beginning, "An employe, or his legal representative," is an adoption of similar provisions found in the other employers' liability acts (see section 117, *supra*), and does not affect the construction of the rest of the section.

The evident purpose of the statute is, in every case, to submit to the jury the question of the servant's assent to undertake a risk arising from the master's negligence, and to strip the court of the power to make a finding on that issue. The statute does not change the common-law rule of assumption of risks. It merely deals with the effect to be given to certain evidence. Heretofore, when a servant entered an employment where there were dangerous conditions which a master might, if he chose, diminish or remove, the servant was held to have assumed the risk if he knew or was bound to know the danger. The fact of acceptance of employment with such knowledge was evidence that he assented to take the risk. The court said no other inference than that of assent could possibly be drawn from this evidence, and consequently found that he did consent, and therefore, as a matter of law, assumed the risk. The statute now provides that this question of assent is to be found by the jury; in other words, that the fact of accepting a dangerous employment does not necessarily show consent, but that other inferences may be drawn from it. In much the same way, when, after the employment was entered into, an unforeseen danger arose from the master's negligence, and was known to the servant, the court said that the fact that the servant continued at work in face of the danger was evidence that he waived the master's default, and consented to run the risk. The court, declaring that this was the proper and the only inference to be drawn from his conduct, found as a fact that the servant consented, and thereby, as a matter of law, assumed the risk. This inference of consent might, however, be rebutted by evidence that the servant was induced to remain at work through fear of discharge or under a promise of repair, and in

Sec. 4. An employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employe for personal injuries, for which compensation may be recovered under this act, or to any relief society or benefit fund created under the laws of this state, may prove in mitigation of damages recoverable by an employe under this act such

such a case the issue of his consent was submitted to the jury. The statute now declares that the fact of continuing at work with knowledge of the risk does not necessarily show an assent to undertake it, and this question is in every case to be determined by the jury. See sections 88, 92, 114.

The effect of the statute is therefore to require the jury to find whether or not the plaintiff consented to run the risk in all cases where the question of consent is material; that is, in cases where the master permits dangerous conditions to exist, and the plaintiff, knowing of them, enters the employment, and where, after entry into the employment, unforeseen risks arise through the master's default, and the servant remains at work with knowledge of them. In the latter case the statute brings about the result which the English courts have reached without the aid of the legislature (section 114a, *supra*), and the rule seems sound. But in the former case the statute is radical. It is believed that the words, "by entering upon or continuing in the service," in the first line, require the jury to find the question of consent when the employment is first accepted, although it is to be noted that later in the statute the words "entering upon" are omitted, and the provision is, "continued in the service of the employer in the same place and course of employment." Is it possible to draw any other inference than "assent" from the fact of accepting employment? If there is no other inference, then, if the jury find the servant did not assent to the risk, they are deciding contrary to the evidence, and the verdict must be set aside. The danger is known, and the plaintiff may work there or not, as he chooses. He chooses to go to work; or he chooses to go to work, but says the danger must be removed, or that he is unwilling to incur it. In either case his acceptance of the employment would seem to be the strongest evidence possible that he was willing to take his chance of injury for the sake of working there. If it is true that the proper or the only inference from such evidence is consent to take the risk, then a jury is bound to find that the plaintiff did consent, and, if they find otherwise, the

proportion of the pecuniary benefit which has been received by such employe from such fund or society on account of such contribution of employer, as the contri-

court is bound to set the verdict aside. No statute is sound which permits a guess to take the place of opinion from the evidence submitted.

The statute only deals with this question of consent to undertake a risk which the master might by due care have prevented, but has not; in other words, it deals with risks which a servant may assume because he is an invited person, not the risks which he is bound to assume because he is a servant. The statute, therefore, has not changed the rule that a servant is presumed to assume the risks arising from dangers incidental to the business, including the negligence of fellow servants, which due care cannot prevent. It adopts the common-law rule and definition of incidental risks. Thus, in *Pantzar v. Tilly Foster Iron Min. Co.*, 99 N. Y. 368, 376, it is said: "The rule that the servant takes the risk of the service presupposes that the master has performed the duties of caution, care, and vigilance which the law casts upon him. * * * It is those risks alone which cannot be obviated by the adoption of reasonable measures of precaution by the master that the servant assumes." See, also, *McGovern v. Central Vermont R. Co.*, 123 N. Y. 280, 286 (subsidence of grain in bin). The following are examples of incidental risks which the court, as a matter of law, holds that a servant assumes: *Bohn v. Havemeyer*, 114 N. Y. 296 (subsidence of sugar in bin); *Hannigan v. Lehigh & H. R. Ry. Co.*, 157 N. Y. 244, and see *Goodrich v. New York Cent. & H. R. R. Co.*, 116 N. Y. 398 (coupling cars); *Arnold v. Delaware & H. Canal Co.*, 125 N. Y. 15 (removing defective cars); *Boldt v. New York Cent. R. Co.*, 18 N. Y. 432; *Brick v. Rochester, N. Y. & P. R. Co.*, 98 N. Y. 211, and *Kennedy v. Manhattan Ry. Co.*, 145 N. Y. 288 (construction or repair of tracks); *Sisco v. Lehigh & H. R. Ry. Co.*, 145 N. Y. 296 (mail crane near track); *Davidson v. Cornell*, 132 N. Y. 228 (fall of girders); *Flood v. Western Union Tel. Co.*, 131 N. Y. 603 (breaking of cross-arm of telegraph pole); *Olive v. Whitney Marble Co.*, 103 N. Y. 292 (testing boilers); *Cullen v. Norton*, 126 N. Y. 1 (blasting in quarry); *Fannessey v. Western Union Tel. Co.*, 6 Misc. Rep. (N. Y.) 322 (clearing debris); *Daly v. Alexander Smith & Sons Carpet Co.*, 69 Hun (N. Y.) 77 (wire flying from loom); *Crispin v. Babbitt*, 81 N. Y. 516 (negligence of fellow servants). See *supra*, §§ 90, 91.

bution of such employer to such fund or society bears to the whole contribution thereto.

Sec. 5. Every existing right of action for negligence or to recover damages for injuries resulting in death is continued and nothing in this act contained shall be construed as limiting any such right of action, nor shall the failure to give the notice provided for in section two of this act be a bar to the maintenance of a suit upon any such existing right of action.

Sec. 6. This act shall take effect July first, nineteen hundred and two.

Approved _____.

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